In the Supreme Court of the United States.

OCTOBER TERM, 1910.

DAVID MUSKRAT AND J. HENRY DICK, on their own behalf, etc., appellants,
v.
THE UNITED STATES.
No. 330.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The above-entitled case is a suit specially authorized to be brought against the United States by the act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), (hereafter referred to as the jurisdictional act), to determine the validity of section 2 of the act of April 26, 1906 (ch. 1876, 34 Stat., 137, 138), as amended by the act of June 21, 1906 (34 Stat., 325, 341, 342), in so far as it attempts to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date pre-

viously fixed by Congress for closing the roll of citizens for that nation.

The only respect here pertinent in which the above-mentioned section, as amended, attempted to increase the number of said persons, was by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe, or had applications pending therefor at the date of the approval of the act. The above-mentioned section, as amended, was passed at the urgent solicitation of the Cherokee Nation (R., 23, 24), and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to the Cherokee Nation to provide the minor children above referred to with allotments or their equivalent (R., 21, 22). And said children to the number of 5,610 have been duly enrolled as provided by the section, but their allotments are held up pending the determination of this suit.

The constitutionality of the amended section is attacked upon the ground that Congress, having, by the act of July 1, 1902 (ch. 1375, 32 Stat., 716, 720, 721), fixed September 1 as the date for finally closing the roll of Cherokee citizens, was not at liberty to revise or supplement that roll so as to include the children above referred to. The alleged inability of Congress to do so is supposed to arise out of the provisions of the act of July 1, 1902 (32 Stat., 716), when taken in connection with the so-called citizen-

ship act of March 3, 1901 (ch. 868, 31 Stat., 1447), amending section 6 of the act of February 8, 1887 (ch. 119, 24 Stat., 388, 390).

It is important here to note chiefly, as indicating the interest which the Cherokee Nation has in protecting the interests of the minor children of that nation who are permitted by the act of June 21, 1906, supra, to share in the distribution of the lands and funds of said nation, that the Cherokee Nation intervened in the Court of Claims on the ground "that the Cherokee Nation is the party directly interested in the determination of this suit, and the United States is only nominally interested therein, and the Cherokee Nation desires the constitutionality of section 2 of the act of April 26, 1906, as amended by the act of June 21, 1906, sustained by the court," etc. (R., 17.)

The United States denied each and every allegation contained in the petition (R., 12). The judgment of this court, therefore, is to be based solely upon the finding of facts by the Court of Claims and the pertinent provisions of law applicable thereto.

In this brief we shall set out—

First. The pertinent provisions of all the acts involved.

Second. The important findings of fact by the Court of Claims.

Third. The argument for the Government, in which it will be contended (*a*) that the case is moot; (*b*) that upon the merits the judgment of the court below should be affirmed and the petition dismissed.

The Pertinent Provisions of the Acts Involved.

The jurisdictional act of March 1, 1907 (34 Stat., 1015, 1028), provides in part as follows:

> That * * * David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrances, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.
>
> And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.
>
> The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and

by the Attorney-General, who is hereby charged with the defense of said suits.

Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said Acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two.[a]

Section 2 of the act of April 26, 1906 (ch. 1876, 34 Stat., 137, 138), provides in part as follows:

That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled. If any citizen of the Cherokee tribe

[a] NOTE.—It is worthy of note that if the contention of the appellant's counsel that Congress had no power, after the final closing of the roll of the Cherokee citizens, as provided in the act of July 1, 1902, to dispose of the unallotted property or any portion of it to others than those so enrolled is sound, the provision providing for the payment of counsel is unconstitutional for the same reason.

> shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. * * * *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.

The amendatory act of June 21, 1906 (ch. 3504, 34 Stat., 325, 341, 342), provides:

> That section two of the Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April twenty-sixth, nineteen hundred and six, be, and the same is hereby amended by striking out thereof the words "*Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided further*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation whose cases are now pending in the Supreme Court of the United States." And insert in said Act in lieu of the matter repealed, the following: *Provided further*, That nothing herein shall be construed so as hereafter to permit any person to file an application for enrollment or to be entitled to enrollment in any of

said tribes, except for minors the children of Indians by blood, or of freedmen members of said tribes, or of Mississippi Choctaws identified under the fourteenth article of the treaty of eighteen hundred and thirty, as herein otherwise provided, and the fact that the name of a person appears on the trial roll of any of said tribes shall not be construed to be an application for enrollment.

The act of July 1, 1902 (ch. 1375, 32 Stat., 716, 717, 720, 721), provides in part as follows:

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designing homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment,

designate as a homestead out of said allotment land equal in value to forty acres of the average allotable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this Act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 18. It shall be unlawful after ninety days after the ratification of this Act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed after the expiration of ninety days after the date of the ratification of this Act shall be deemed guilty of a misdemeanor.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this Act. * * *

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 74. This Act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

The appropriation act of March 3, 1901 (ch. 832, 31 Stat., 1058, 1077), provides in part as follows:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the In-

terior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

The joint resolution of March 2, 1906 (34 Stat., 822), provides:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Section 28 of the act of April 26, 1906 (34 Stat., 137, 148), provides as follows:

> That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: Provided, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of

any validity until approved by the President of the United States: Provided further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

The act of February 8, 1887 (ch. 119, 24 St., 388, 390, 391), provides in part as follows:

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of

any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

* * * * *

That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory.

The so-called citizenship act of March 3, 1901 (ch. 868, 31 Stat., 1447), provides as follows:

That section six of chapter one hundred and nineteen of the United States Statutes at Large numbered twenty-four, page three hunddred and ninety, is hereby amended as follows, to wit: After the words "civilized life," in line thirteen of said section six, insert the words "and every Indian in Indian Territory."

Important Findings of Fact in the Court of Claims.

It will be noted that many of the findings stated below, as well as those omitted, are mere conclusions of law, based on various statutes and treaties.

By an act of Congress approved March 3, 1893 (27 Stat., 645), a commission, afterwards designated as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of said

commission appointed under said act was continued from year to year by subsequent acts of Congress. (R., 19.)

* * * * *

At the time of the passage of said act, July 1, 1902, the members of said tribe residing in said Territory were the communal owners under treaties, among other things, of about four and a half million acres of land, with water rights, leases to railroads, pipe lines, telegraph and telephone companies, and other public-service corporations; also of valuable public buildings, schoolhouses, and townsite property, and also of a large sum in the Treasury of the United States, which still remains in the Treasury, and to which other sums have been added and still others are to be added, exceeding $2,000,000.

Proceeding under the authority of said act, the Commission to the Five Civilized Tribes, upon the basis of an allotment of 110 acres of the average allottable lands, as provided by section 11 of said act, fixed the then value of said average allotment at $325.60.

After the allotment to those entitled under the provisions of said act July 1, 1902, upon the basis aforesaid, there yet remain sufficient lands to provide about 3,800 allotments of the present aggregate value of about $2,500,000. None of the funds in the United States Treasury to the credit of the Cherokee Nation have been distributed. (R., 21.)

By section 2, act of April 26, 1906, as amended by the act June 21, 1906 (34 Stat. L., 137 and 341)—making said act applicable

to Cherokees—the time for the completion of the roll so made under the act July 1, 1902, and prior acts, was extended or supplemented by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of said act.

Under said acts minor children of enrolled Cherokee parents born after September 1, 1902, and living on March 4, 1906, to the number of 5,610 were enrolled on separate lists as other Cherokee citizens had been under the act of July 1, 1902, and which were, after correction and amendment, approved by the Secretary of the Interior on or before March 4, 1907, as provided by said act of April 26 as amended by the act of June 21, 1906; *and there remain enough unallotted lands and undistributed funds in the Treasury of the United States belonging to said Cherokee Nation to equalize the allotments of all Cherokee citizens whose names are upon the roll last approved by the Secretary of the Interior under said acts of April 26 and June 21, 1906.* (R., 21, 22.)

* * * * *

On September 28, 1905, *the Cherokee national* council, in conformity with section 3, article 6, of the constitution of the Cherokee Nation, *passed an act, which was approved* November 7, 1905, *by the President of the United States*, entitled "An act providing for a commission to represent the Cherokee Nation in the preparation of legislation for the

final settlement of its affairs," the pertinent parts of which were in the words and figures as follows, to wit:

"Whereas under existing laws the tribal government of the Cherokee Nation ceases on the fourth day of March, nineteen hundred and six; and

"Whereas many vital and important questions affecting the educational, financial, and property interests of the Cherokee Nation and its people remain open and unprovided for by existing laws and treaties; and

"Whereas those in whom this vast estate is vested and whose rights are involved, the Cherokee people, ought to be consulted and have a right to be heard in that behalf: Therefore

"*Be it enacted by the national council of the Cherokee Nation:* Section 1. That the principal chief be, and he is hereby, authorized and directed to appoint a commission, consisting of three persons, by and with the consent of the Senate, who shall be authorized to represent the Cherokee Nation in the preparation of legislation for the final settlement of its affairs and of our relations with the United States of America, except as to all matters now pending in the courts of the United States.

* * * * *

"*Be it further enacted: Sec.* 4. That the principal chief or, in the event of a written statement by him of his inability to attend at any time, the assistant chief is hereby authorized to attend upon said commission as an ex officio member thereof, without compensation

other than the salary already provided by law for such officers, respectively, except said principal chief or assistant chief, as the case may be, who may be actually engaged with said commission, shall receive his actual and necessary personal and traveling expenses while so engaged outside the Cherokee Nation, to be shown by itemized accounts in duplicate, accompanied by vouchers; and a sufficient sum is hereby appropriated, out of the general fund not otherwise appropriated, to pay the same.

"*Be it further enacted:* SEC. 5. It is hereby made the duty of the national attorney of the Cherokee Nation to accompany said commission and advise them upon matters of law, and assist them in the work without additional expense to the Cherokee Nation."

And as provided in said act the following members of the Cherokee commission were appointed: W. W. Hastings, E. L. Cookson, and Fred McDaniel. (R., 23.)

On September 29, 1905, the Cherokee commission, composed of W. W. Hastings, E. L. Cookson, and Fred McDaniel, by a joint resolution of the national council of the Cherokee Nation was instructed as follows:

"*Resolved,* It is the sense of the national council of the Cherokee Nation, representing the Cherokee people, that a final settlement of our affairs should be made:

"First. For the participation of all children born since September first, nineteen hundred and two, and prior to March fourth, nineteen hundred and six, who but for the limitation

65329—10——2

contained in section twenty-five of the act of Congress of July first, nineteen hundred and two, would be entitled to share equally with children born prior thereto, and that said participation should, if possible, be equal in every respect in the lands and moneys as provided by said act of Congress. If this can not be, then a sum of money should be given to each of said children as will equal so far as possible the share which has been given others under said act.

"Second. For the sale of surplus lands, public property, buildings, and grounds upon the very best terms possible, and the distribution of our moneys per capita among those entitled thereto when the same shall have been collected and our obligations satisfied, or provisions made therefor.

"Third. For continuing the primary schools, seminaries, insane asylum, and orphanage at the expense of the Cherokee Nation, until such time as by taxation or otherwise a general school system is established by another government in the Cherokee Nation; that it would be double taxation, unfair and unjust to the Cherokee people, to retain a portion of their funds for the maintenance of schools beyond the time when a general or public school system is provided for all inhabitants of said nation alike.

"*Be it further resolved*, That the commission heretofore authorized by act of the national council are requested to use their best efforts to secure the favorable action of Congress upon the matters referred to in this resolu-

tion." After the commencement of the suit herein, to wit, August 17, 1907, said resolutions were approved by the President of the United States. (R., 24.)

The Cherokee commission, accompanied by W. C. Rogers, principal chief of the Cherokee Nation and ex officio member of said commission, and by Luman F. Parker, jr., national attorney of the Cherokee Nation, came on to Washington on November 21, 1905, and conferred with the representatives of the Interior Department, the Commissioner of Indian Affairs, and the House and Senate Committees on Indian Affairs, and at the request and recommendation of said Cherokee commission, as instructed by the Cherokee national council, section 2 of the act of April 26, 1906 (34 Stat., 137), providing for the enrollment of minor children living on March 4, 1906, born of recognized and enrolled parents in the Cherokee Nation with the same property rights as other recognized and enrolled citizens of the Cherokee Nation, was incorporated into the act of April 26, 1906, and amended by the act of June 21, 1906 (32 Stat., 325). (R., 24.)

Section 2 of amendments to article 1 of the constitution of the Cherokee Nation provides:

"The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article twenty of the treaty of nineteenth of July, eighteen hundred and sixty-six, between the United States and the Cherokee Nation."

And said section 20 of the treaty of 19th of July, 1866 (14 Stat., 799), provides as follows:

"Whenever the Cherokee national council shall request it the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States." (R., 25.)

By section 63, act July 1, 1902, *supra*, it was provided that "the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906." But by joint resolution of Congress approved March 2, 1906 (34 Stat., 822), it was extended as follows:

"That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law."

And the tribal government of the Cherokee Nation was thereafter continued by section 28 of the act of April 26, 1906 (34 Stat., 137), "until otherwise provided by law," and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation. The allottable lands and funds remaining after the allotments among those enrolled under the act of July 1, 1902, were allotted and distribution provided for to those enrolled

under said act of April 26, as amended by the act of June 21, 1906. Said allotments are treated by the Interior Department "as tentative allotments," their finality depending upon the construction of said acts of April and June, 1906. (R., 25.)

ARGUMENT.

A.

This case is moot, and there is nothing upon which a judgment of the court can properly operate.

Before discussing the merits of the controversy presented by this appeal, to wit, the power of Congress in 1906 to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September 1, 1902, the date previously fixed by Congress for closing the roll of citizens for that nation, by permitting the enrollment of children who were minors living on March 4, 1906, whose parents had theretofore been enrolled as members of the Cherokee tribe or had applications pending therefor at the date of the approval of the act of April 26, 1906, we desire, as we have previously done in the *Brown and Gritts* case, to call attention to an important question concerning the constitutionality of the jurisdictional act itself.

The sole authority for bringing this suit is a certain provision in the jurisdictional act of March 1, 1907 (ch. 2285, 34 Stat., 1015, 1028), an examination of which (R., 22) will clearly show that the jurisdictional act is unconstitutional.

This is so for the reason that the jurisdictional act itself does not authorize this court to make any judgment which this court can properly make in any proceeding. The last paragraph in the jurisdictional act shows the nature of the judgment which the act intended to authorize, to wit, merely a judgment denying the validity of certain acts of Congress. This being the nature of the judgment contemplated by the jurisdictional act itself, the petitioners were not entitled to ask for a judgment of any other sort or description, and Congress has no more power to authorize suits to be brought against the United States for the mere purpose of determining the validity of its acts than it has to submit directly to this court the academic question of whether one or more of its acts are constitutional. It can not do indirectly what it is forbidden by the Constitution to do directly. It is immaterial that Congress might have authorized the suit to be brought against the United States as to the lands involved in this case in ejectment or otherwise. It has authorized no such suit.

B.

Upon the merits, the judgment below dismissing the petition should be affirmed.

Upon the merits of the case the Government will contend:

I. That it is indisputable that prior to the passage of the so-called citizenship act of March 3, 1901, whatever title or interest the Cherokees had in the

unallotted lands and funds of that tribe was in them as a nation and not as individuals, and that said lands and funds were subject to the paramount authority of Congress to distribute them as it saw fit among such persons as it might find entitled thereto by any means which it deemed appropriate, and that therefore it was within the power of Congress, for the purpose of distributing said lands and funds, to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

II. That the so-called citizenship act of March 3, 1901, did not affect the paramount authority of Congress to dispose of the tribal lands and funds of the Cherokee Nation to such persons as it might find entitled thereto and to revise and supplement the roll of citizens of that nation as often as in its judgment justice required it.

III. That the Cherokee allotment act of July 1, 1902, whether taken by itself or in connection with the so-called citizenship act of March 3, 1901, did not affect or destroy in any way the power of Congress to dispose of the tribal lands and funds of the Cherokees to such persons as it might find entitled thereto by any appropriate means, and to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

Preliminarily it should be observed that if on March 2, 1901, Congress had authority to distribute the unallotted lands and funds of the Cherokee tribe to such persons as it might find entitled thereto, by any

means which it deemed appropriate, and had the power to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it, it had that power when the act of June 21, 1906, was passed, amending section 2 of the act of April 26, 1906, *supra*, unless its authority to do so was destroyed by some act or grant between those dates. The only acts that can be claimed to have had that effect between March 2, 1901, and June 21, 1906, are the so-called citizenship act of March 3, 1901, and the Cherokee allotment act of July 1, 1902. It is not contended that any grant was made, unless it is to be found in the act of July 1, 1902.

I.

It is indisputable that prior to the passage of the so-called citizenship act of March 3, 1901, whatever title or interest the Cherokees had in the unallotted lands and funds of that tribe was in them as a nation and not as individuals, and that said lands and funds were subject to the paramount authority of Congress to distribute them as it saw fit among such persons as it might find entitled thereto by any means which it deemed appropriate, and that therefore it was within the power of Congress, for the purpose of distributing said lands and funds, to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

(*a*) Whatever title or interest the Cherokees had in the unallotted lands and funds of that tribe prior to the passage of the so-called citizenship act of March 3, 1901, was in them as a nation, not as individuals. (*Stephens* v. *Cherokee Nation*, 174 U. S., 445, 478, 483,

488; *Cherokee Nation* v. *Hitchcock*, 187 U. S., 294, 305–307. See also *Lone Wolf* v. *Hitchcock*, 187 U. S., 553, 568; *Wallace* v. *Adams*, 204 U. S., 415; *Fleming* v. *McCurtain*, 215 U. S., 56; *Conley* v. *Ballinger*, 216 U. S., 84, 90, 91.)

In *Stephens* v. *Cherokee Nation* (174 U. S., 445, 478, 483, 488) the principal question involved was, "Was the legislation of 1896 and 1897, so far as it authorized the Dawes Commission to determine the citizenship of these tribes constitutional?" This court held that it was constitutional upon the ground as stated in its opinion by Chief Justice Fuller that "the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms." Moreover, the Chief Justice, in the course of his opinion, referred to the interest of persons claiming to be entitled to citizenship in the Five Civilized Tribes as "the mere expectation of a share in the public lands and moneys of these tribes if hereafter distributed, if the applicants are admitted to citizenship."

In *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 295, 305) the complainants sought to enjoin the Secretary of the Interior from leasing oil lands held for the benefit of the Cherokee Nation on the ground that the act of June 28, 1898 (30 Stat., 495), was unconstitutional in so far as it attempted to confer authority upon the Secretary of the Interior to make said

leases. The complainants contended that by virtue of the treaties of May 6, 1828 (7 Stat., 331), February 14, 1833 (7 Stat., 414), and December 29, 1835, and of the patent of 1838 based upon said treaties, the Cherokee Nation was vested with the fee-simple title to its tribal lands, with the right to enact and enforce laws for the protection of the lands and for the welfare of the tribe, and that, therefore, the provisions of the act above referred to were unconstitutional. But this court rejected that contention in an opinion by Mr. Justice White, which is in part as follows (p. 305):

> As the acts done and contemplated to be done by the appellee and assailed by the bill of complaint, are presumably not the subject of criticism, in the event that the act of June 28, 1898, was a constitutional and valid exercise of power by Congress, we will now address ourselves to a consideration of that statute.
>
> * * * * *
>
> * * * Considering the treaty of 1835 with the Cherokee Nation, under which it is now claimed on behalf of the appellants, that the Cherokees became vested with the sole control over the lands ceded to them, the court observed [in *Stephens* v. *Cherokee Nation*, 174 U. S. 484]:
>
> By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or juris-

diction of any State or Territory. * * * But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits.

* * * * *

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308.

In *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568) Mr. Justice White, in referring to the last-named case, said:

The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the sur-

> plus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294), decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

Also in *Wallace* v. *Adams* (204 U. S., 415, 423) Mr. Justice Brewer, in referring to the earlier case of *Stephens* v. *Cherokee Nation* (174 U. S., 445), said:

> This decision established that no such vested right was created by the proceedings of the

Dawes Commission or the judgments of the courts of the Indian Territory on appeal from the findings of the commission as prevented subsequent investigation. The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory, it could try another.

(*b*) Prior to the passage of the so-called citizenship act of March 3, 1901, Congress had full power over the unallotted lands and funds of the Cherokee Nation, and could distribute them as it saw fit among such persons as it might find entitled thereto by any means it deemed appropriate.

1. Despite the fact that the Indian tribes have some sort of an interest in their unallotted lands, Congress has repeatedly assumed and exercised the power of disposing of those lands without the tribes' consent and against their will. The exercise of that power was sustained in *Cherokee Nation* v. *Hitchcock* (187 U. S., 294, 295, 305), and again in *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568).

It is true that in the former case the only question necessarily involved in the judgment was the power of Congress to lease unallotted lands of the Cherokee Nation against the will of the tribe. But, of course, no valid distinction can be taken between the power to lease and the power to sell. It is true also that the funds derived from the leasing of said lands were to be used for the benefit of the tribe, but this does

not destroy the fundamental fact that Congress assumed ownership over this land against the will of the tribe, though, of course, for a worthy purpose.

In *Lone Wolf* v. *Hitchcock* (187 U. S., 553, 568) Congress assumed and exercised the power of disposing of the unallotted property of the Comanche, Kiowa, and Apache tribes of Indians contrary to the express provisions of its treaties with them, and it is very doubtful whether it gave the tribes a *quid pro quo* for the property disposed of. Concerning this aspect of the transaction, this court said:

> The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. * * * If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

(*c*) The right which Indian tribes have in their unallotted land is one which the United States is bound by honor to respect—not by law. The latest decision of the United States Supreme Court on this subject has affirmed what the preceding cases left little doubt

of—to wit, that the United States was bound only in honor to observe the rights which Indians have in their tribal lands.

This is squarely the ground of the decision in *Conley* v. *Ballinger* (216 U. S., 84, 90). In that case the complainant was a descendant of the Wyandotte Indians. The Wyandotte Indians had ceded their land to the United States for subdivision in severalty to the members thereof, except a certain portion, concerning which it was expressly provided in the treaty that it shall be permanently reserved and appropriated for the purpose for which it was then used—to wit, a public burying ground. Numerous members of the complainant's family were buried therein. The Secretary of the Interior was on the point of selling the same. The complainant accordingly brought an action to enjoin the Secretary of the Interior from selling or disturbing the Indian cemetery, urging that she had a legal and vested estate in that cemetery, etc. Upon this state of facts Mr. Justice Holmes said:

> The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the

members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.

But we do not pursue the attempt to state the argument on that side because we are of opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. (*Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565.) When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the tribe. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so.

(*d*) If the United States is only bound in honor to respect the interest which the Indian tribe has in its unallotted land, it is clear beyond a doubt that the United States, for the purpose of distributing the unallotted tribal lands among the members of the tribe, may revise and supplement the roll of citizens of that tribe as often as it sees fit.

Moreover, this court has not only established indirectly beyond question that Congress has the power to supplement and revise the roll of citizens of an Indian tribe as often as it sees fit, but it has practically settled the question itself by direct decision.

For in *Stephens* v. *Cherokee Nation, supra,* this court had under consideration the power of Congress, after having provided that the judgments of the lower court should be final as to persons entitled to be enrolled as citizens of the Cherokee Nation, and other members of the Five Civilized Tribes, to provide for a review of those judgments by this court, and the power was upheld.

In *Wallace* v. *Adams* (204 U. S., 415, 423), where this court had under consideration a similar question in regard to the Five Civilized Tribes, Mr. Justice Brewer said concerning the power of Congress over citizenship in Indian tribes that—

> The power of Congress over the matter of citizenship in these Indian tribes was plenary, and it could adopt any reasonable means to ascertain who were entitled to its privileges. If the result of one measure was not satisfactory it could try another. The fact that the first provision was by an inquiry in a territorial court did not exhaust the power of Congress to preclude further investigation.

II.

The so-called citizenship act of March 3, 1901, did not affect the paramount power of Congress to dispose of the tribal lands and funds of the Cherokee Nation to such persons as it might find entitled thereto, and to revise and supplement the roll of citizens of that tribe as often as in its opinion justice required it.

(*a*) The so-called citizenship act of March 3, 1901 (ch. 868, 31 Stat., 1447), amending section 6 of the General Allotment Act of February 8, 1887 (ch. 119, 24 Stat., 388, 391), it seems, was only designed to confer United States citizenship upon those Indians in the Indian Territory who had voluntarily taken up their residence separate and apart from any tribe of Indians, and had adopted the habits of civilized life.

Section 6 and section 8 of the General Allotment Act of February 8, 1887, provides as follows:

> Sec. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under

any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property (24 Stat., 390).

Sec. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, etc. (24 Stat., 390).

The act of March 3, 1901 (31 Stat., 1447), provided that section 6 should be amended by inserting after the words "civilized life" the words "and every Indian in Indian Territory."

The position of the phrase "and every Indian in Indian Territory" in section 6, as amended by the act of March 3, 1901, suggests that the class to which it refers may reasonably be limited by the provision which immediately precedes it and which refers to Indians in the United States who have voluntarily taken up their residence separate and apart from any

tribe of Indians and have adopted the habits of civilized life. Doubtless there was such a class of Indians in the Indian Territory, especially in its rapidly growing towns, who had taken up their residence separate and apart from other tribes and had adopted the habits of civilized life and were in fact more or less ready for citizenship.

The act of March 3, 1901, if limited to such a class will be more in harmony with section 8 of the general allotment act, which it did not expressly repeal, and which, therefore, should be given some effect, unless entirely inconsistent with section 6, as amended by the act of March 3, 1901. Moreover, if the act of March 3, 1901, is thus limited in its scope, it will be in more harmony with the fact that Congress, in the act of May 8, 1906 (ch. 2348, 34 Stat., 182), amended section 6 of the general allotment act, and in that amendment not only completely ignored the act of March 3, 1901, but expressly declared that the section should be inapplicable to any Indians in the Indian Territory.

If that be the scope of the so-called citizenship act, it will scarcely be contended that it was intended to limit or affect the power of Congress over tribal lands and property.

(*b*) But whether the act of March 3, 1901, conferred citizenship upon all members of the Five Civilized Tribes or not, the citizenship conferred by it was of a qualified character, and not intended to alter the fundamental relation existing between the United States and said Indians and their property.

Certainly, Congress may, if it chooses, confer qualified citizenship upon Indians dwelling within the Territory. In other words, Congress may confer upon an Indian many or most of the rights which a United States citizen usually enjoys, without conferring all.

In view of this, the general words in the above section supposed to confer citizenship should be construed in connection with other congressional legislation of about the same date, showing an intention on the part of Congress to retain its peculiar control over the Indians in question.

Congress, at the same session at which it passed the so-called citizenship act of March 3, 1901, also passed an act of the same date in which it recognized the tribal government of the Indians concerned, and assumed the power (through the Secretary of the Interior) to fix the time to close the rolls of citizens entitled to share in the property of the Five Civilized Tribes without the consent of the tribes or any of their members in case no agreement could be reached with the tribes as to the time of closing the rolls (act of March 3, 1901, ch. 832, 31 Stat., 1058, 1077), for in the last-named act it was expressly provided:

> The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for

closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

That no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the principal chief thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

Despite the passage of the so-called citizenship acts Congress continued to deal with the Indians of the Five Civilized Tribes as tribes. (See act of June 30, 1902, ch. 1323, 32 Stat., 500, 504; 32 Stat., 2021; act of July 1, 1902, ch. 1362, 32 Stat., 641; act of July 1, 1902, ch. 1375, 32 Stat., 716.)

Indeed, the Cherokee allotment act of July 1, 1902 32 Stat., 716, 721), itself extended the time previously fixed for closing the roll of citizens of the Cherokee Nation from July 1, 1902, to September 1, 1902, and continued the tribal government.

(*c*) The decisions and judgments of this court confirm the view above expressed, that whatever citizenship was conferred upon the members of the Five Civilized Tribes was of a qualified character, and not intended to alter the fundamental relation existing between the United States and said Indians and their property. (*United States* v. *Celestine*, 215 U. S., 278, 289, 291; *United States* v. *Sutton*, 215 U. S., 291, 292, 295; *United States* v. *Rickert*, 188 U. S., 432, 437. See also *Conley* v. *Ballinger*, 216 U. S., 84, 90.)

At the outset it should be observed that the members of the Five Civilized Tribes did not receive their allotments under the provisions of the general allotment act, and therefore acquired citizenship, if at all, under the second sentence of section 6 of that act. The significance of this fact will immediately appear upon an examination of the latest cases in this court.

In the *Celestine* case this court distinguished between all Indians who received allotments under the general allotment act of February 8, 1887, and who were, by the first sentence of section 6 of that act, expressly declared "to be subject to the laws, both civil and criminal, of the State or Territory in which they reside," and concerning whom it was also expressly provided that "no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law," and the Indians who, under the second sentence of the act, were merely declared to be citizens of the United States and entitled to all the rights, privileges, and immunities of such citizens.

The ground upon which that distinction is based is clearly stated in the opinion by Mr. Justice Brewer, which is in part as follows:

> It will be seen that the first sentence of the latter section, which provides that the allottees shall be "subject to the laws, both civil and criminal, of the State or Territory in which they may reside," applies to allotments and patents made under the authority of that act, whereas the other sentence refers to allotments made under the act of 1887, or under any law or treaty, and in respect to the allottee it is provided only that he "is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In other words, so far as the plea is concerned, it is only that Celestine was a citizen of the United States, and entitled to all the rights, privileges and immunities of such citizenship.
>
> * * * * *
>
> Notwithstanding the gift of citizenship, both the defendant and the murdered woman remained Indians by race, and the crime was committed by one Indian upon the person of another, and within the limits of a reservation. Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be

> clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race. There is not in this case in terms a subjection of the individual Indian to the laws, both civil and criminal, of the State; no grant to him of the benefit of those laws; no denial of the personal jurisdiction of the United States.
>
> (*United States* v. *Celestine*, 215 U. S., 278, 289–291.)

In *United States* v. *Sutton* (215 U. S., 291, 292, 295) the defendants were indicted in the District Court of the United States for the Eastern District of Washington for introducing liquor into the Indian country, to wit, upon a certain allotment within the limits of the boundary of the Yakima Indian Reservation, in the Eastern District of Washington, in violation of the act of January 30, 1897 (29 Stat., 506), by which it was provided—

> That * * * any person who shall introduce * * * intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished, etc. * * *.

Defendants demurred to the indictment upon the ground that the act was invalid, at least in so far as it related to the land in question, which, together with other land in the reservation, had been allotted sub-

ject to restrictions against alienation to the Indians who, by virtue of said allotment, became citizens of the United States under section 6 of the general allotment act. The lower court sustained the demurrer, squarely basing its judgment upon the invalidity of the act. This court reversed the judgment of the lower court, and fully sustained the validity of the act. The opinion by Mr. Justice Brewer indicates that the judgment was based in part at least upon the broad proposition that even Indian allottees, though citizens of the United States, are nevertheless wards of the United States so long as they hold their land subject to restrictions against alienation. Mr. Justice Brewer's opinion is in part as follows (p. 295):

> The lands allotted were subject to restrictions against alienation, and the title which was conferred by the allotments was subject to defeasance. * * * In this offense neither race or color are significant. The Indians, as wards of the Government, are the beneficiaries, but for their protection the prohibition is against all, white man and Indian alike. Legislation of this nature has been for a long time in force. Fourth sec., chap. 174, Laws 1832, 4 Stat. 564; § 2139, Rev. Stat. If the Yakima Reservation were within the limits of a Territory there would be no question of the validity of the statute under which this indictment was found, but the contention is that the offense charged is of a police nature and that the full police power is lodged in the State, and by it alone can such offenses be punished.

In *United States* v. *Rickert* (188 U. S., 432, 437) this court, in an opinion by Mr. Justice Harlan, recognized that a mere grant of United States citizenship to Indians does not necessarily prevent their being wards of the United States, or, at any rate, that the citizenship conferred by section 6 of the general allotment act is or may be of such a qualified character as to permit Indians receiving citizenship by virtue of said act to continue to be wards of the United States in a condition of pupilage or dependency. For in that case, despite the fact that the Indians in question had become citizens of the United States and had received their allotments, this court, in its opinion by Mr. Justice Harlan, describes their relation to the United States in these words:

> These Indians are yet wards of the Nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of a national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the

> course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the question has arisen." *United States* v. *Kagama*, 118 U. S. 375, 384.

Under these decisions, therefore, it would seem clear that the mere grant of citizenship does not necessarily terminate the peculiar relation of the Indians to the United States, and that the extent to which that relationship continues is to be determined in the light of the entire legislation affecting the tribes in question.

The *Heff case* (197 U. S., 488, 499, 502) does not conflict with this view. The Indians there concerned had received their grant under the first sentence of the general allotment act, and had been expressly made subject to the criminal laws of the State within which they dwelt. Moreover, the Indians concerned were Kickapoo Indians, and the judgment of the court was largely based upon the legislation affecting those Indians. Besides, the judgment concerned the subjection of the Indians to the criminal laws of the State. In the course of his opinion Mr. Justice Brewer said concerning the power of Congress to continue or abandon its guardianship of the Indians:

> It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine

> when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end (p. 499).

(*d*) But aside from this, the so-called citizenship act of March 3, 1901, expressly provides that the citizenship conferred shall not impair or affect the right of the Indian receiving it to tribal or other property. The exact words of the act here pertinent are: "Every Indian" (to wit, every Indian to whom the language applied) "is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges, and immunities of such citizens * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

If it did not affect the right of the Indian to the tribal property, how could it affect the power of Congress over that tribal property?

(*e*) Besides, the case of *Conley* v. *Ballinger* (216 U. S., 84, 90) establishes beyond question that no matter in what terms United States citizenship may be conferred upon the members of an Indian tribe, the members of that tribe acquire no interest in the unallotted land of that tribe which the United States is bound by law to respect.

In that case the complainant brought a bill in equity to enjoin the Secretary of the Interior and others from selling or disturbing an Indian cemetery. The bill was demurred to on various grounds. *The bill in substance charged that the complainant was a citizen of the State of Kansas and of the United States, and a descendant of the Wyandotte Indians* dealt with in the treaty of January 31, 1855 (10 Stat., 1159). That by article 1 of that treaty the tribe of the Wyandottes was to be dissolved on the ratification of the treaty and the members made citizens of the United States, with exemption for a limited time of such as should apply to it for exemption. That by article 2 the Wyandotte Nation ceded their land to the United States for subdivision in severalty to the members, "except as follows, viz, the portion now inclosed and used as a public burying ground, shall be permanently reserved and appropriated for that purpose," etc. That the complainant's parents and sister are buried in this burial ground, and she alleges that she has seizin, and a legal estate and vested rights in and to the same. That the defendants are threatening to sell the burying ground, etc., and that the proceeds, after certain deductions, were to be paid to parties to the treaty of 1855, or their representatives, in accordance with the act of Congress of June 21, 1906 (ch. 3504, 34 Stat., 325, 348), and that therefore said act under which the Secretary is intending to act violates the constitutional rights of the complainant and is void. Moreover, an examination of the above-mentioned act shows

that the deductions above referred to were very extensive. Notwithstanding this, the court held that since whatever rights the Wyandottes had in their unallotted lands was in them as a tribe, and since the United States had complete legislative power over the tribal lands of the Wyandottes, and since it was only bound in honor to respect the interest of the tribe therein, the complainant had no such interest in the property as to entitle her to an order restraining the Secretary of the Interior. The grounds upon which this court based its opinion are cogently stated in the opinion by Mr. Justice Holmes, which opinion is in part as follows (pp. 89, 90):

> The argument that vested rights were conferred upon individuals by that treaty, stated as strongly as we can state it, would be that, as the tribe was to be dissolved by the treaty, it cannot have been the beneficiary of the agreement for the permanent appropriation of the land in question as a public burying ground, that the language used imported a serious undertaking, and that to give it force as such the United States must be taken to have declared a trust. If a trust was declared, the benefit by it must have been limited to the members of the disintegrated tribe and their representatives, whether as individuals or as a limited public, and thus it might be possible to work out a right of property in the plaintiff, as a first step towards maintaining her bill.
>
> But we do not pursue the attempt to state the argument on that side because we are of

opinion that it is plainly impossible for the plaintiff to prevail. There is no question as to the complete legislative power of the United States over the land of the Wyandottes while it remained in their occupation before their quitclaim to the United States. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 565. When they made that grant they excepted this parcel. Therefore it remained, as the whole of the land had been before, in the ownership of the United States, subject to the recognized use of the Wyandottes. But the right of the Wyandottes was in them only as a tribe or nation. The right excepted was a right of the title. The United States maintained and protected the Indian use or occupation against others, but was bound itself only by honor, not by law. This mode of statement sounds technical perhaps, but the principles concerned are not so.

III.

Nor did the Cherokee allotment act of July 1, 1902, whether taken by itself or in connection with the so-called citizenship act of March 3, 1901, affect the paramount power of Congress to dispose of the tribal lands and funds to such persons as it might find entitled thereto by any appropriate means, and to revise and supplement the roll of citizens of that nation as often as in its opinion justice required it.

(*a*) In the Cherokee allotment act of July 1, 1902 (ch. 1375, 32 Stat., 716), Congress assumed and exercised authority over the tribal lands and funds of the Cherokees inconsistent with the supposition that it

conceived of itself, as having lost by the so-called citizenship act, its paramount authority over said tribal property. It provided for the allotment of specific quantities of land, for the extension of the time for closing the roll, for a particular method by which the tribe might ratify the act, and for the continuance of the tribal government until March 4, 1906. It also placed restrictions upon the sale and leasing of that land after it had been received by the allottee.

(*b*) The act of July 1, 1902, if, when duly ratified as therein provided, was an agreement with any party or parties, it was an agreement with the Cherokee Nation as a tribe, and not the members thereof as individuals.

1. The ratification provided for by the act was to be by the tribe as such. The principal chief was to issue the proclamation for an election to determine whether the act would be accepted or rejected, and he, as principal chief, was to appoint such officers and make such other provisions as might be necessary for holding such election, and the votes cast at that election were to be certified, as required by the Cherokee law, and counted by the Cherokee National Council in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief were jointly to transmit the certificate of the votes cast and the proclamation of the result of the election to the President of the United States.

2. The fact that at the date of the act whatever title or interest the Cherokees had in the unallotted

65329—10——4

lands and funds of that tribe was in them as a nation and not as undividuals militates against the view that Congress intended to enter into any agreement with the members of the nation as individuals.

3. The continuance of the tribal government by the act itself confirms the view that whatever agreement was made was made with the tribe itself.

4. Moreover, it has always been the custom of Congress to deal with the tribes themselves, and it is not to be supposed that Congress varied from its custom in the act of July 1, 1902.

5. Besides, the act of July 1, 1902, was not an agreement or treaty with any party, but a mere act of Congress. (*Cherokee Intermarriage Cases*, 203 U. S., 76, 93.)

(*c*) The agreement, if any, being with the Cherokee Nation as a tribe, the promises therein contained, if any, were to it as a tribe. This is clearly implied by the case of *Conley* v. *Ballinger* (216 U. S., 84, 89–91), where the court held, among other things, that despite the fact that the treaty contemplated the dissolution of the tribe in question it was more reasonable to suppose that the promise therein contained as to the use of certain property was addressed only to the tribe and rested for its fulfillment on the good faith of the United States, "a good faith that would not be broken by a change believed by Congress to be for the welfare of the Indians." *Fleming* v. *McCurtain* (215 U. S., 56) is to the same effect, where it was held that an ambiguous word capable of being construed as either applicable to the tribe itself or

to the members thereof as individuals should, in the treaty with the tribe, be construed as applicable to the tribe.

Moreover, the fact that the statute is in reality merely a statute, despite its ratification by the tribe, does not affect the proposition that its promises, if any, should be construed as made to the tribe, not to the individual members thereof, for Congress provided for the ratification of the statute by the tribe, and the modern method of dealing with the Indian tribes by statute is but a substitute for the old method of dealing with them by treaty. Therefore, since whatever promises are contained in the act of July 1, 1902, are to the tribe, if it contained a direct promise to the effect that all such lands and funds remaining over after the distribution specially provided for in the act had been made should be distributed in equal shares among the enrolled citizens of the Cherokee tribe as of the date of September 1, 1902, it would be a promise to the tribe and one which the United States was merely bound in honor to respect. (*Conley* v. *Ballinger*, 216 U. S., 84, 90, 91.) Likewise, the provision in the act that "no person whose name does not appear upon the roll prepared as herein provided shall be entitled in any manner to participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act," if a promise to any one was a promise to the tribe, and therefore Congress is only bound in honor to keep it.

(*d*) The act only specifically provided for the allotment of land equal in value to 110 acres of the average allottable lands of the Cherokee Nation, and expressly provided that it should be unlawful, ninety days after the ratification of the act, for any member of the Cherokee tribe to inclose or hold possession of in any manner, by himself or through another, directly or indirectly, more lands in value than that of 110 acres of average allottable land of the Cherokee Nation, either for himself or for his wife, or for each of his minor children. The failure of Congress to provide means for distributing the lands and funds of the Cherokee tribe in equal parts among all members of that tribe suggests that Congress deliberately intended only to provide for the allotment of a portion of the tribal lands and to retain the balance for such emergencies as might arise.

(*e*) The contention, therefore, that the act amounts to a grant is utterly untenable, for not even the provision as to the allotment of the 110 acres was in any sense a grant before actual allotment. Certainly vague promises by implication as to future participation in the unallotted lands and undistributed funds of the Cherokee Nation are not to be construed as grants.

(*f*) If, as has been shown, the act of July 1, 1902, itself does not grant an undivided interest in the unallotted lands of the Cherokee Nation to anyone, it will scarcely be contended that the act, when considered in connection with the so-called citizenship act, grants such an interest.

(*g*) The act contains no reference, direct or indirect, to United States citizenship, nor do its provisions show any intention on the part of Congress to abandon its peculiar guardianship over the citizens of the Cherokee Nation, at least as to their tribal property.

CONCLUSION.

In conclusion, it is submitted that if, as has been shown, the act of July 1, 1902, did not grant the individual members of the Five Civilized Tribes any vested interest in such land as should remain unallotted after the allotment specially provided for had been made, that Congress was at liberty to supplement the roll of citizens of the Cherokee Nation by providing for the enrollment of children born after September 1, 1902, living on March 4, 1906, despite the fact, if such be the fact, that the members of the Cherokee Nation have been citizens of the United States in every sense of the word since the so-called citizenship act of March 3, 1901, and despite the fact, if such be the fact, that that citizenship completely destroyed the peculiar relationship of those Indians to the United States.

Further, if, as has already been shown, neither the so-called citizenship nor the act of July 1, 1902, destroyed the peculiar relationship of the Cherokee Indians to the United States, the alleged fact that the act of 1902 granted an undivided interest in all the lands and funds of the Cherokee Nation to citizens of said nation, as of the date of September 1,

1902, is immaterial, for the property of Indians, so long as they are wards of the United States, especially where it has not been actually distributed to them, is subject to the paramount authority of the United States to redivide so as to secure a more equitable distribution thereof.

The judgment of the Court of Claims should be affirmed.

WADE H. ELLIS,
HENRY E. COLTON,
Special Assistants to the Attorney-General.

NOVEMBER, 1910.

O

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTEREST IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED SEPTEMBER 20, 1909.

(21,830.)

(21,830.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 331.

WILLIAM BROWN AND LEVI B. GRITTS, ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHER CHEROKEE CITIZENS HAVING LIKE INTEREST IN THE PROPERTY ALLOTTED UNDER THE ACT OF JULY 1, 1902, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print
Petition	1	1
Amendments to petition	21	13
Traverse	24	14
Intervening petition of Cherokee Nation	25	14
Objection of claimants to appearance of Cherokee Nation	32	19
Argument and submission of case	33	19
Findings of fact and conclusions of law	34	19
Opinion of the court by Peelle, C. J	44	30
Dissenting opinion by Howry, J	54	40
Judgment of the court	63	49
Order of court on claimants' motion for rehearing and defendant's motion for amended findings of fact	64	49
Application for and allowance of appeal	65	50
Certificate	66	50

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 27, 1910.

1

I. *Original Petition.*

Filed March 16, 1907.

In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS, on Their Own Behalf and on Behalf of All Other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

vs.

THE UNITED STATES.

To the Honorable the Chief Justice and the Associate Justices of the Court of Claims:

Your petitioners, William Brown and Levi B. Gritts, respectfully state and show unto your Honors that—

Under and by virtue of the treaty of New Echota, made on the 29th day of December, 1835, between the Cherokee Indians and the United States, the lands comprising the Cherokee domain were given and granted to the Cherokees in fee simple and the grant thereof confirmed by a patent from the United States, bearing date December 31, 1838, and again confirmed by the treaty of Washington, between the same parties, concluded on the 6th day of August, 1846. Up to the passage of the act of July 1, 1902, hereinafter referred to, these lands were held by the Cherokee people as communal owners thereof; and the communal property on the date last men-

2 tioned, embraced in addition to about four and one-half million acres of land, valuable public buildings, including school houses, asylums, council houses, and other townsite property, also valuable leases to railroads, pipe lines, telegraph and telephone companies, and other corporations; also water rights of great value; also about three million dollars in money then in the Treasury of the United States, to which fund large sums have since been, and others still are to be, added.

By the Constitution of the Cherokee Nation, adopted September 6, 1839, it was provided, in Article one, Section 2 thereof, that "the lands of the Cherokee Nation shall remain common property," and by the first amendment to Article one of said Constitution, in Section 2 thereof, which amendment was adopted November 26, 1866, it was provided that "The lands of the Cherokee Nation shall remain common property until the National Council shall request the survey and allotment of the same, in accordance with the provisions of Article 20th of the Treaty of the 19th day of July, 1866, between the United States and the Cherokee Nation." Article 20 of said Treaty is as follows:

"Art. 20. Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for

the Cherokees to be surveyed and allotted among them, at the expense of the United States."

By Act of the Cherokee Council, at its Session of 1901, a formal request for the division and allotment of said lands was made, and, in pursuance of said request, the allotment Act of July 1, 1902, was passed and submitted to the Cherokee people, and ratified and agreed to by them as herein shown.

II.

Petitioners and all others on whose behalf this suit is brought are citizens of the United States and of the Cherokee Nation,
3 resident in the Indian Territory, are full-blood Indians and enrolled as Cherokee citizens for allotment, and bring this suit in their own right and on behalf of all other persons having like interest in the property allotted under the said act of July 1, 1902, entitled "An Act to Provide for the Allotment of the Lands of the Cherokee Nation, for the Disposition of the Townsites Therein, and for Other Purposes" (32 Stat. L., 716).

III.

The act of Congress referred to in the foregoing paragraph, approved July 1, 1902, contains the following provisions affecting the petitioners and the Cherokee tribe of which they were and are members.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

4 SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by

a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

This act containing these provisions was duly submitted, as provided by the terms of the act, to the Cherokee people, who, by a popular vote, as was also therein provided, ratified and agreed to the same on August 7, 1902; and the act thus ratified and agreed to, was proclaimed by the acting chairman of the Commission to the Five Civilized Tribes and by the Principal Chief of the Cherokee Nation, on August 12, 1902, in the following proclamation, to-wit:

"Whereas, an Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902, provides:

"The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for the purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by the Cherokee Law, and the votes shall be counted by the Cherokee National Council, if then in session, if not in session the principal chief shall convene

an extraordinary session for that purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and make proclamation of the results, and transmit the same to the President of the United States."

6 "And whereas, said principal chief did, within ten days after the passage of said Act by Congress, make public proclamation that the same should be voted upon at a special election to be held on the 7th day of August, 1902, in the Cherokee Nation, Indian Territory:

"And whereas, said special election was held on the 7th day of August, 1902, in said Nation:

"And whereas, the said Cherokee National Council convened in extraordinary session for the said purpose, and in the presence of a member of the Commission to the Five Civilized Tribes, did, on the 12th day of August, 1902, count the votes cast at said election.

"And whereas, the votes cast at said election were canvassed by the Cherokee National Council and the votes cast at said election show that the said Act was ratified by a majority of nineteen hundred and sixty-four votes:

"Now, therefore, we Tams Bixby, a member of the Commission to the Five Civilized Tribes, and Thomas M. Buffington, principal chief of the Cherokee Nation, do hereby certify and proclaim that the said Act of Congress, entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," approved July 1, 1902, was by popular vote, at a special election held on the 7th day of August, 1902, ratified by the legal voters of the Cherokee Nation by a majority of nineteen hundred and sixty-four votes:

"Done at Tahlequah, Cherokee Nation, Indian Territory, on the 12th day of August, 1902."

(Signed) TAMS BIXBY,
Member of the Commission to the Five Civilized Tribes.

(Signed) T. M. BUFFINGTON,
Principal Chief of the Cherokee Nation.

7 Under the provisions of this act, there were allotted to your petitioners, certain tracts of land as their homesteads, and there were also set apart and allotted to them at the same time, in accordance with the provisions of the act, certain other tracts or bodies of lands in addition to the homesteads known as "surplus allotments."

IV.

All due and necessary legal formalities, including the issuance of allotment certificates vesting the absolute title in your petitioners in the said homesteads and in the said surplus allotments, were complied with prior to March 11, 1904; so that your petitioners, together with all other persons on whose behalf this suit is brought, were, each, on and before the 11th day of March, 1904, vested with a good and indefeasible title in fee simple to the lands so allotted to them, subject only to the conditions set out in the said act of July 1, 1902.

V.

Your petitioner, William Brown, is an adult full-blood Indian, and an heir at law of Charles Brown, deceased, being his father, who was himself a citizen of the Cherokee tribe, and died subsequent to the first day of September, 1902, and to whom, prior to his death, an allotment had been made under the act of July 1, 1902. By Section 20 of the said act of July 1, 1902, it was provided that such an allotment should descend to the heirs of the allottee "according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

By said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, it is provided as follows:

8 "When any person shall die, having title to any real estate of inheritance, or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

1. To children or their descendants in equal parts.

2. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants in equal parts." (Section 2522, p. 575.)

The said Charles Brown, at the time of his death, was a minor of tender years, without children or descendants, and was intestate. His said estate, therefore, descended to your petitioner William Brown, as his sole heir at law.

VI.

By the said act of July 1, 1902, and the said proceedings thereunder, your petitioners William Brown and Levi B. Gritts, and all other persons on whose behalf they bring this suit, became vested with the fee simple title to the lands selected by them respectively for allotment, and particularly with the right, which immediately vested, to lease all their said allotments without restriction for all purposes, including rights of way for pipe lines and railroads and for other public or private enterprises except as restricted by the terms of said Act; for a term of one year for grazing purposes, and for a period of five years for agricultural purposes, without the approval of the Secretary of the Interior, or other restriction of any kind, and with the right after five years from the date of the ratification of the act, namely August 7, 1902, to alien their said lands except those allotted as homesteads.

And under the laws of descent and distribution in force in the Indian Territory, as hereinbefore set out, and applicable to your petitioner William Brown, he became, by reason of the descent cast

9 on him by the death of his son, said Charles Brown, the owner of the said lands selected by the said Charles Brown, and with the right to encumber, lease or alienate the same after August 7, 1907, as any other citizens of the United States, without the consent or interposition of the Secretary of the Interior, or any other officer of the United States.

VII.

But by the act of Congress approved March 11, 1904 (Pub. 45), entitled, "An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," it is provided that the Secretary of the Interior may grant rights of way for the construction, operation and maintenance of pipe lines, for the conveyance of oil and gas, through any lands which have been allotted in severalty to any individual Indian, under any law or treaty, but which have not been conveyed to the allottee, with full power of alienation upon certain terms; and by the same act it is provided that where such lines are not subject to State or Territorial taxation, the revenues arising from such grants shall be paid to the Secretary of the Interior for the use and benefit of the Indians.

And under the authority of this act, the Secretary of the Interior has granted rights of way across the lands of a large number of said allottees among those in whose behalf this suit is brought, and has collected the revenues arising therefrom, and placed the same, not to the credit of the allottees respectively, but to the credit of the general tribal fund; so that moneys payable to allottees for rights of way through their respective allotments are held and are to be enjoyed, and participated in, by all allottees of the Cherokee Nation.

In said act of March 11, 1904, it is further provided that the Secretary of the Interior, at the expiration of the first twenty years, may extend the right to maintain any pipe line constructed under this act for an additional period of twenty years; so that for forty years moneys to be realized from rights of way through the lands of individual allottees may be diverted from the owners of the particular allotments to all the 36,000 allottees of the Cherokee Nation.

Said act of March 11, 1904, provides:

That the Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: *Provided*, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line com-

pany: *Provided further,* That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe-line company shall be permitted to lay its lines under said railroad. The compen-
11 sation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided,* That the rights herein granted shall not extend beyond a period of twenty years; *Provided further,* That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper.

SEC. 2. The right to alter, amend, or repeal this act is expressly reserved.

VIII.

By an act of Congress entitled "An Act to Provide for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory and for Other Purposes" (— Stat. L., —), which
12 was approved by the President of the United States, April 26, 1906, and on that day became effective, it was provided:

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the experiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior; *Provided, however,* That such full-blood Indians or any of said tribes may lease any lands other than homesteads for more than one year under such rules and

regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations; *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

13 SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition and filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

IX.

In accordance with the said act approved April 26, 1906, the Secretary of the Interior has prepared and promulgated certain regulations (here to the court shown) entitled "Regulations of July 7,

1906," governing the leasing and sale of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes for the
14 purpose of carrying into effect the provisions of said sections 19, 20 and 22 of the said act of Congress.

X.

Your petitioners charge, as they are advised and believe, that the right to these allotments as specified, and the right to lease their lands without the supervision of the Secretary of the Interior, and the right to sell inherited lands without the assent or supervision of the Secretary of the Interior, and all other rights hereinbefore described, are vested rights of property duly established and complete in your petitioners, and those on whose behalf they bring this suit, as individuals, which could not be impaired by any subsequent acts of Congress; and therefore that said Act of March 11, 1904, and the said Act of April 26, 1906, and any and all other acts attempting to extend the time in which petitioners might not encumber or alienate their said lands, and might not lease their said lands or any of them, and might not grant any rights of way to pipe lines or other public service corporations, and might not receive the revenues arising from such leases or rights of way, and attempting to provide another method for the disposition of the interests of your petitioner, William Brown, and other persons similarly interested, in the said lands inherited by him or them, accomplishes in each instance, a taking of the property of your petitioners and the other persons on whose behalf they bring this suit, in violation of that provision of the Constitution of the United States, that: "No person shall be deprived of life, liberty or property without due process of law;" and the same are in all such particulars void and of no effect.

XI.

The said lands allotted to your petitioners, and those on whose behalf they bring this suit, and those lands inherited by
15 your petitioner, William Brown, as well as lands so inherited by other full-blood citizens of the Cherokee Nation, on whose behalf also, this suit is brought, are all suitable for both grazing and agricultural purposes; but by reason of said unconstitutional statutes, and by reason of the said regulations made in pursuance thereof by the Secretary of the Interior, your petitioners are unable to contract advantageously for the lease of said lands, or to negotiate for the granting of any easements or rights of way, to railroads, pipe lines, telephone or telegraph companies, or other public service corporations, or to deal with their said lands and said rights, as, being the owners in fee simple of the said lands, and citizens of the United States, they are entitled to deal therewith.

XII.

On the 3rd day of January, 1907, your petitioner, William Brown, filed his bill in the Supreme Court of the District of Columbia in which the foregoing allegations substantially were made. He alleged

also in his said bill that the Secretary of the Interior and the Commissioner of Indian Affairs were about to put into force and effect the said provisions of the said Act of April 26, 1906.

And he now alleges that the Secretary of the Interior has put into force and effect the provisions of the said Act of March 11, 1904, and that the same are now in effect. So that the revenues derived from rights of way through and over allotments of your petitioners and those on whose behalf this suit is brought, are paid and to be paid into the general tribal fund instead of being paid in each case to the respective owners of the lands through or over which such lines are laid or constructed.

In the said bill filed in the Supreme Court of the District of Columbia, your petitioner, William Brown, prayed the issuance of a writ of injunction against the Secretary of the Interior and
16 the Commissioner of Indian Affairs, the prayer of said bill being as follows:

In consideration of the premises, plaintiff prays that process of subpœna issue to the said defendants, Ethan A. Hitchcock and Francis E. Leupp, requiring them, and each of them, to appear and answer fully the exigencies of this bill, and to that end that all necessary process issue and all proper orders be had; that a preliminary injunction issue to said defendants, and to each of them, for rule to show cause why a perpetual injunction should not be granted enjoining them, and each of them, from carrying into effect the said regulations promulgated by the said defendants and from taking any action whatever regarding the said premises of the plaintiff in the pursuance of the said unconstitutional and void act of April 26, 1906; that by the decree of this honorable court the said act of April 26, 1906, be declared, in the particulars mentioned, or in all particulars, to be violative of and repugnant to the constitutional provision cited and therefore to be void and of no effect; and, finally, if mistaken in this, his prayer for relief, that he may have such other, further, and general relief as from the allegations of this bill seems fit and proper to this honorable court.

But before a hearing on the application for the writ of injunction could be had, a bill was introduced in Congress providing the reference of this suit to this Honorable Court. Your petitioners desiring the judgment of this court, and seeking the speedy disposition of the litigation which would be so accomplished, and the Department of the Interior being likewise disposed, it was stipulated in said action in the said Supreme Court of the District of Columbia, that it should be continued, and remain pending, until Congress should determine whether a bill to refer the said cause to this court was to be passed.

XIII.

By an item on the Indian Appropriation Bill of March 1,
17 1907 (Public No. 154), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and eight," it was provided:

That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens, having like interests in the property allotted under the Act of July first, nineteen hundred and two, entitled "An Act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," and David Muskrat and J. Henry Dick, on their own behalf, and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any Acts of Congress passed since the said Act of July first, nineteen hundred and two, in so far as said Acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said Act of July first, nineteen hundred and two.

And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal, by either party, to the Supreme Court of the United States, to hear, determine and adjudicate each of said suits.

The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts, and by the Attorney-General, who is hereby charged with the defense of said suits.

18 Upon the rendition of final judgment by the Court of Claims, or the Supreme Court of the United States, denying the validity of any portion of the said Acts, authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said Act of July first, nineteen hundred and two.

XIV.

Your petitioners charge that they are the identical persons named in the said jurisdictional act as William Brown and Levi B. Gritts, that under the authority of said act they have the right to bring this suit for and on behalf of themselves and of all Cherokee citizens having like vested property rights, under the said act of July 1, 1902.

Wherefore, the premises considered, your petitioners pray:

First. That they have the judgment and decree of this Honorable Court declaring that your petitioners and all other persons having like interests with them, became vested as individuals under the provisions of the act of July 1, 1902, with the right to lease their lands without the approval of the Secretary of the Interior, with the right to receive the revenues arising from rights of way granted through their

respective allotments, with the right to dispose of their inherited lands as other citizens of the United States under the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, with the right to alien their said lands or otherwise encumber the same (except their homesteads), within five years from the date of the ratification of the said act of July 1, 1902, and with all other rights of
19 citizens of the United States as to their vested interests, modified only by the conditions prescribed in the said act of July 1, 1902.

Second. That they have the further judgment and decree of this Honorable Court declaring the said Acts of March 11, 1904, and April 26, 1906, in the particulars mentioned in the foregoing bill, to be violative of and repugnant to the constitutional provision cited, and therefore to be void and of no effect.

Third. That they have the further judgment and decree of this Honorable Court that any and all acts of Congress passed since the said act of July 1, 1902, which in any wise attempt to restrict your petitioners and others having like interests, on whose behalf they bring this suit, in their property rights, beyond the restrictions contained in said act, be declared also, violative of the said constitutional provision, inoperative and void; and finally, if mistaken in this their prayer for relief, that they have such other, further, and general relief as the allegations of this petition may demonstrate to be fit and proper to this Honorable Court.

WILLIAM BROWN,
By WM. H. ROBESON,
His Attorney.

(Signed) LEVI B. GRITTS.

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Petitioners.

20 DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me, Levi B. Gritts, and being first duly sworn deposes and says: I am one of the petitioners in the foregoing petition; I have carefully read the same; the statements therein made are true to the best of my knowledge, information and belief.

(Signed) LEVI B. GRITTS.

Subscribed and sworn to before me this 14th day of March, 1907.

CRAYCE E. WILTBERGER,
[SEAL.] *Notary Public.*

My commission expires February 18th, 1911.

21 II. *Amendments to Original Petition.*

Filed March 26, 1908.

In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS on Their Own Behalf and on Behalf of all other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

v.

THE UNITED STATES.

Amendments to Original Petition.

Come now the petitioners, by leave of the court first had and obtained, and present to the court the following amendments to their original petition, the averments of which they now charge to be true.

To be inserted as XI (*a*):

The act of April 26, 1906, which, in section 19, makes all lands upon which restrictions are removed subject to taxation is in violation of the special privilege conferred in section 13 of the allotment act of July 1, 1902, exempting homestead allotments from taxation as long as they should be held by the allottees. This exemption from taxation was and is a valuable property right which
22 Congress had not the power to destroy; and the said provision of said act of April 26, 1906, is likewise in violation of the due process clause of the Constitution.

To be inserted as XI (*b*):

By the act of March 1, 1907 (34 Stat. L., 1025), Congress provided appropriations to carry into effect the provisions as to the leasing and sale by the Secretary of the Interior, under the rules and regulations prepared by him, of the lands of allottees in the following words:

"For clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians, under the act of April 26, 1906, thirty thousand dollars; for clerical work and labor connected with the sale of inherited and other lands, Five Civilized Tribes, thirty thousand dollars; in all, sixty thousand dollars: *Provided*, That the sums so expended shall be reimbursable out of the proceeds of such land sales, and leases, and shall be equitably apportioned by the Secretary of the Interior from the moneys collected from such sales and leases."

For as much as the act of April 26, 1906, vesting the Secretary of the Interior with the power to lease or sell said allotments is in violation of the Constitutional provision that private property shall
23 not be taken without due process of law, this provision appropriating said sum of sixty thousand dollars is likewise violative of the same provision, and the Secretary of the Interior is

without authority to charge any sum against any allottee on account of the expenses of such unauthorized leasing or sale.

WILLIAM BROWN,
LEVI B. GRITTS,
By WM. H. ROBESON, *Attorney.*

WM. H. ROBESON,
DANIEL B. HENDERSON,
JOHN J. HEMPHILL,
FRANK J. BOUDINOT,
Attorneys for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

This day personally appeared before me William H. Robeson, who deposes and says under oath, I am one of the attorneys for petitioners. The allegations of the foregoing amendments are true as I verily believe.

WILLIAM H. ROBESON.

Subscribed and sworn to before me this March 26th 1908.
[SEAL.] MARTHA M. BECK,
Notary Public, District of Columbia.

24 III. *Traverse.*

Filed November 24, 1908.

In the Court of Claims of the United States, December Term, A. D. 1908.

No. 29987.

WILLIAM BROWN and LEVI GRITTS
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

25 IV. *Intervening Petition of the Cherokee Nation.*

Filed by Leave of Court May 20, 1908.

Intervening Petition of the Cherokee Nation.

To the Honorable Chief Justice and Associate Justices of the Court of Claims of the United States:

The Cherokee Nation by its principal chief, William C. Rogers, represented by its attorney in fact, William W. Hastings, respectfully shows to this court:

1. As the representative and having in its charge the interests of the Cherokee people entitled to participate in the distribution of the estate belonging to them, it is directly interested in this cause.

2. The Cherokee Nation of Indians is and at all times has been a body politic and recognized as such by the United States.

3. That under and by virtue of the provisions of certain acts of Congress and of the treaties between the United States and the Cherokee Nation of Indians, and the patent of the United States to the Cherokee Nation issued on the 31st day of December, 1838, as supplemented and interpreted by the treaty between the same parties on August 17, 1846, the people of the Cherokee Nation of Indians became the owners of the lands embraced within the limits of the Cherokee Nation, formerly Indian Territory, now Oklahoma, and are possessed of and now own all of said lands that have not been allotted to individual allottees.

4. That said Cherokee Nation as a body politic possessed and under the provisions of the treaties aforesaid was granted the right of local self-government with full authority to make and carry into effect all such laws as it might deem necessary for the Govern-
26 ment and protection of persons and property within its jurisdiction, belonging to its own people or such persons who might be associated or connected with them.

5. In the exercise of this governmental power the people of the Cherokee Nation ordained and established a written constitution and system or code of laws.

6. That by an act of Congress approved March 3, 1893 (27 Stat. L., 645), a Commission, hereafter known as the Commission to the Five Civilized Tribes, was appointed to negotiate agreements with the Five Civilized Tribes, including the Cherokee Nation, for the allotment of the lands in severalty of the Cherokee Nation, and the authority of the Commission appointed under said act was continued from year to year by acts of Congress.

7. On June 10, 1896, Congress by an act (29 Stat. L., 321) conferred the additional authority upon the Commission referred to in the sixth paragraph hereof to hear and determine the applications of all persons for admission to citizenship in the Cherokee Nation with the right of appeal to both the applicant and the Cherokee Nation to the United States court in the Indian Territory, now Oklahoma, and by the act of July 1, 1898 (30 Stat. L., 591), it was provided that an appeal might be taken by either party to the Supreme Court of the United States.

8. By an act approved June 28, 1898 (30 Stat. L., 495), Congress authorized and directed the Commission to the Five Civilized Tribes, with the approval of the Secretary of the Interior, to make a final roll of all persons entitled to be enrolled as citizens of the Cherokee Nation, with instructions in section 21 of said act as to how said roll should be made; and said Commission was further instructed by the act of May 31, 1900 (31 Stat. L., 221), not to receive, consider, or make any record of the application of any person whomsoever who had not been a recognized citizen of the nation and duly and lawfully enrolled and admitted as such.

27 9. On May 11, 1900, the Commission to the Five Civilized Tribes began making the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat. L., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat. L., 221); March 3, 1901 (31 Stat. L., 1073); July 1, 1902 (32 Stat. L., 716); April 26, 1906 (34 Stat. L., 137), and June 21, 1906 (34 Stat. L., 324), were passed, and said roll was completed on March 4, 1907, containing the names of 41,798 enrolled citizens of the Cherokee Nation of whom 6,600 are full-blood Cherokee Indians.

10. That the Commission to the Five Civilized Tribes began the allotment of the lands of the Cherokee Nation to such citizens whose enrollments had been approved on the first Monday of January, 1903, as provided by the act of Congress approved July 1, 1902 (32 Stat. L., 716), and said Commission to the Five Civilized Tribes and its successor, the Commissioner to the Five Civilized Tribes, has continued said allotment to those citizens whose enrollment was from time to time finally approved by the Secretary of the Interior under said act and subsequent acts of Congress, and is now so engaged in the allotment of said land, the work not having been completed.

11. That section- 13, 14, 15 and 63 of said act of July 1, 1902 (32 Stat. L., 716) are as follows:

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

28 SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such lands as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

12. That the tribal existence of the Cherokee Nation was extended by joint resolution of the Congress of the United States approved March 2, 1906, as follows:

That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes or the proceeds thereof shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

And the tribal government of the Cherokee Nation was also continued by section 28 of the act of April 26, 1906 (34 Stat. L., 137), until otherwise provided by law, and no other law has been subsequently enacted providing for the dissolution of the tribal government of the Cherokee Nation.

13. That Congress by sections 19, 20 and 22 of an act approved April 26, 1906 (34 Stat. L., 137) extended the period within which full-blood Cherokee Indians could not alienate their allotted lands to twenty-five years and provided for the supervision by the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands as follows:

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however,* That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further,* That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further,* That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other then homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval; *Provided,* That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided further,* That all leases entered into for a period of more than one year shall be recorded in conform-

ity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

14. That in accordance with section 28 of the act of April 26, 1906 (34 Stat. L., 137), W. C. Rogers, the duly elected, recognized, and acting principal chief of the Cherokee Nation has employed William W. Hastings as attorney for the Cherokee Nation by contract, which contract was approved by the President of the United States, as provided in said section 28, on February 3, 1908, and expires March 4, 1909, and among other things said contract provides that the said William W. Hastings shall represent the Cherokee Nation in all cases in which it is interested before the Court of Claims, when the interests of the Cherokee Nation require it, or when directed by the principal chief.

31 15. That the Cherokee Nation is directly interested in protecting its own citizens, particularly the less educated and more dependent class, the full-blood citizens, and the Cherokee Nation desires the constitutionality of the provisions of the acts complained of in the petition filed herein enacted for the protection of the Cherokee citizens, sustained.

16. That the petitioners herein do not represent the Cherokee Nation or any of the enrolled citizens thereof other than themselves, and are without authority to appear for or to represent any of them.

Wherefore your petitioner prays the court that the Cherokee Nation may be allowed to intervene in said case and be made party defendant for the reasons hereinabove assigned.

WILLIAM W. HASTINGS,
Attorney in Fact for the Cherokee Nation.

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a notary public in and for the District of Columbia, personally appeared William W. Hastings, and made oath in due form of law that the matters and things contained in the foregoing petition are true as herein set forth, to the best of his knowledge and belief.

Witness my hand and notarial seal this 14th day of May, 1908.

[SEAL.] LEONA E. KIDWELL,
Notary Public.

32 V. *Objection of Petitioners to Appearance of Cherokee Nation.*

Filed Nov. 18, 1908.

Objection is made by the petitioners in this case, to the appearance of the Cherokee Nation, as sought to be effected by its intervening petition, for the following reasons, to-wit:

1. The act provides that the United States alone shall be made a party defendant to the suit.

2. No complaint whatever is made by the petitioners against the Cherokee Nation, and no recovery sought against it.

3. Whatever judgment may be rendered by this court, can not affect the Cherokee Nation.

4. The case involves only the validity of certain enactments of Congress.

5. There is no such body as the Cherokee Nation and was not at the time of the filing of the petition.

WM. H. ROBESON.
DAN'L B. HENDERSON.
JOHN J. HEMPHILL.

33 VI. *Argument and Submission of Case.*

On November 24, 1908, the argument for the claimants was begun by Mr. John J. Hemphill.

On November 25, 1908, Mr. George M. Anderson was heard for the defendants and Mr. William W. Hastings was heard for the Cherokee Nation. Mr. Daniel B. Henderson and Mr. William H. Robeson replied for the claimants and the case was submitted.

34 VII. *Findings of Fact and Conclusions of Law, and Opinion of the Court and Dissenting Opinion of Howry, J.*

Filed February 8, 1909.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

In pursuance of the provisions of the treaties of February 14, 1833 (7 Stat., 414), and December 29, 1835 (7 Stat., 478), between the United States and the Cherokee Nation, and in accordance with the provisions of the act of May 28, 1830 (4 Stat., 411), the President of the United States, on December 31, 1838, executed a patent conveying to the Cherokee Nation 14,374,135.14 acres of land, subject to

certain conditions, among which "to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-cited third article, and which condition is that the lands hereby granted shall revert to the United States if the Cherokee Nation becomes extinct or abandons the same," of which there remained undivided, as the property of the Cherokee Nation, on July 1, 1902, 4,420,000 acres of land.

II.

On May 11, 1900, the Commission to the Five Civilized Tribes began the making of the roll of citizens of the Cherokee Nation under the act of Congress approved June 28, 1898 (30 Stat., 495), and was engaged in the making of said roll when the acts of May 31, 1900 (31 Stat., 221), March 3, 1901 (31 Stat., 1073), July 1, 1902 (32 Stat., 716), April 26, 1906 (34 Stat., 137), and June 21, 1906 (34 Stat., 321), were passed; and said roll was completed on March 4, 1907, containing the names of 41,798 enrolled citizens of the Cherokee Nation, of whom 8,698 are Cherokee citizens of the full-blood.

35 III.

The act approved July 1, 1902 (32 Stat., 716), entitled "An act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," was submitted, in accordance with its terms, to a vote of the Cherokee people, by whom it was ratified on August 7, 1902, and the ratification thereof was, on August 12, 1902, certified and proclaimed by the chairman of the Five Civilized Tribes and the principal chief of the Cherokee Nation.

The first amendment to article 1 of the constitution of the Cherokee Nation, adopted November 26, 1866, provided that "the lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same in accordance with the provisions of article 20 of the treaty of July 19, 1866, between the United States and the Cherokee Nation," which provides:

"Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the land reserved for the Cherokee Nation to be surveyed and allotted among them at the expense of the United States." (14 Stat. L., 799.)

IV.

The Commission to the Five Civilized Tribes began the allotment of the lands of the Cherokee Nation, aggregating about 4,420,000 acres, to citizens thereof, whose enrollment had been approved on the first Monday of January, 1903, as provided by the act of Congress approved July 1, 1902, *supra*, and said Commission and its successor, the Commissioner to the Five Civilized Tribes, have continued the making of said allotments to those citizens whose enrollment has from time to time been finally approved by the Secretary of the

Interior, under said act and subsequent acts of Congress, and is now still engaged in the allotment of said lands.

V.

In pursuance of the said act of July 1, 1902, allotment certificates and patents for homesteads and surplus lands have been and are still being issued to lawfully enrolled Cherokee citizens in accordance with the following forms:

Department of the Interior,
Commission to the Five Civilized Tribes.

Certificate of Allotment.

Roll number.

Cherokee roll.	Freedmen roll.

Certificate
No. ——.

CHEROKEE LAND OFFICE,
——, I. T., —— —, 190–.

This certifies that —— —— has this day filed his selection of the following-described land, viz:.....
.....
containing — acres, more or less, as the case may be, according to the United States survey thereof. Total appraised value of land described in this certificate $——.

36

COMMISSION TO THE FIVE CIVILIZED TRIBES,
—— ——,
Commissioner in Charge.

This certificate is not transferable.

Department of the Interior, Commission to the Five Civilized Tribes.

Certificate of Homestead Allotment.

Roll number.

Cherokee roll.	Freedmen roll.

Certificate
No. —.

CHEROKEE LAND OFFICE,
——, I. T., —— —, 190–.

This certifies that —— —— has this day selected the following-described land as a homestead, viz:.....
.....
containing —— acres, more or less, as the case may be, according

to the United States survey thereof. Total appraised value of land described in this certificate $——.

COMMISSION TO THE FIVE CIVILIZED TRIBES,

—— ——, *Commissioner in Charge.*

This certificate is not transferable.

Date of certificate, —— —, —.

Homestead deed ——, Cherokee Citizen Roll No. —.

The Cherokee Nation, Indian Territory.

To all whom these presents shall come, greeting:

Whereas by the act of Congress, approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Nation, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation; and

Whereas it was provided by the said act of Congress that each member of said tribe shall, at the time of the selection of his allotment, designate or have selected and designated for him from his allotment, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, as a homestead, for which separate certificate shall issue; and

Whereas the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of —— ——, a citizen of said tribe, as a homestead:

Now, therefore, I, the undersigned, the principal chief of the Cherokee Nation, by virtue of the power and authority vested
37 in me by the aforesaid act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said —— ——, all right, title, and interest of the Cherokee Nation, and of all other citizens of said nation, in and to the following-described land, viz:.....

.....

acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said act of Congress pertaining to allotted homesteads.

In witness whereof I, the principal chief of the Cherokee Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this — day of ——, —. —— ——,

Principal Chief of the Cherokee Nation.

Department of the Interior.

Approved —— —, 190–.

[Seal of the Cherokee Nation.]

—— ——,

Acting Secretary.

By —— ——, *Clerk.*

Date of certificate, —— —, —.

Allotment deed ——, Cherokee Citizen Roll No. —.

The Cherokee Nation, Indian Territory.

To all to whom these presents shall come, Greeting:

Whereas by the act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation; and,

Whereas it is provided by said act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate; and,

Whereas the said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of —— ——, a citizen of said tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid:

Now, therefore, I, the undersigned principal chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said —— —— all right, title, and interest of the Cherokee Nation and of all other citizens of said nation in and to the following-described land, viz:

.....

38 acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said act of Congress.

In witness whereof I, the principal chief of the Cherokee Nation, have hereunto set my hand and caused the great seal of said nation to be affixed this — day of —— —, —.

——— ———,
Principal Chief of the Cherokee Nation.

Department of the Interior.

Approved —— —, 190–.

[Seal of the Cherokee Nation.]

——— ———,
Acting Secretary,
By —— ——, *Clerk.*

VI.

Under the provisions of the said act, there were allotted to the petitioners, William Brown and Levi B. Gritts, and to those other persons on whose behalf this suit is brought, certain tracts of lands as their homesteads, respectively, and there were also set apart and allotted to each of them, in accordance with the provisions of said

act, certain other tracts or bodies of land designated as "surplus allotments."

VII.

By act of Congress approved March 11, 1904 (33 Stat. L., 65), entitled "An act authorizing the Secretary of the Interior to grant rights of way for pipe lines through Indian lands," it is provided that the Secretary of the Interior may grant rights of way for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with the power of alienation upon certain terms; and by the same act it is provided that where such lands are not subject to state or territorial taxation, the revenues arising from such grants shall be paid to the Secretary of the Interior for the use and benefit of the Indians; and under the authority of this act the Secretary of the Interior has granted rights of way across the lands of a large number of said allottees, in whose behalf this suit is brought, and has collected the revenues arising therefrom and has paid the same over to the individual allottees upon whose lands said rights of way have been located.

In said act of March 11, 1904, it is further provided that the Secretary of the Interior, at the expiration of the first twenty years, may extend the right to maintain any pipe lines constructed under the authority of said act for an additional period of twenty years.

VIII.

By an act of Congress entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes" (34 Stat., 137), which was
39 approved by the President of the United States April 26, 1906, and on that day became effective, it was provided:

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of

restriction, where patents thereafter issue, shall not be deemed or held invalid solel, because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inher-ted from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

IX.

In accordance with the said act approved April 26, 1906, the Secretary of the Interior has prepared and promulgated certain regulations entitled "Regulations of July 7, 1906," and also other regulations of June 11, 1907, governing the leasing and sale of lands allotted to, or inherited by, full-blood Indians of the Five Civilized Tribes, for the purpose of carrying into effect the provisions of said sections 19, 20, and 22 of said act of Congress, which regulations are by reference made a part hereof.

X.

By a provision in the Indian appropriation bill of March 1, 1907 (34 Stat. L., 1015, 1028), entitled "An act making appropriation for the current and contingent expenses of the Indian Department for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June 30, 1908," it was provided—

"That William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interests in the property allotted under the act of July first, nineteen hundred and two, entitled 'An act to provide for the allotment of lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes,' and David Muskrat and J. Henry Dick, on their own behalf and on behalf of all Cherokee citizens enrolled as such for allotment as of September first, nineteen hundred and two, be, and they are hereby, authorized and empowered to institute their suits in the Court of Claims to determine the validity of any acts of Congress passed since the said act of July first, nineteen hundred and two, in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens, or to increase the number of persons entitled to share in the final distribution of lands and funds of the Cherokees beyond those enrolled for allotment as of September first, nineteen hundred and two, and provided for in the said act of July first, nineteen hundred and two.

"And jurisdiction is hereby conferred upon the Court of Claims, with the right of appeal by either party to the Supreme Court of the United States, to hear, determine, and adjudicate each of said suits.

"The suits brought hereunder shall be brought on or before September first, nineteen hundred and seven, against the United States as a party defendant, and for the speedy disposition of the questions involved, preference shall be given to the same by said courts and by the Attorney-General, who is hereby charged with the defense of said suits.

"Upon the rendition of final judgment by the Court of Claims or the Supreme Court of the United States, denying the validity of any portion of the said acts authorized to be brought into question, in either or both of said cases, the Court of Claims shall determine the amount to be paid the attorneys employed by the above-named parties in the prosecution thereof, for services and expenses, and shall render judgment therefor, which shall be paid out of the funds in the United States Treasury belonging to the beneficiaries under the said act of July first, nineteen hundred and two."

41 XI.

The petitioners, William Brown and Levi B. Gritts, are the identical persons named in the jurisdictional act approved March 1, 1907 (34 Stat., 1015-1028), and are enrolled as full-blood citizens of the Cherokee Nation, and have received allotment certificates and patents for their respective shares of Cherokee tribal lands under the act

of July 1, 1902, *supra*. The restrictions upon the alienation of a part of the surplus lands of the petitioner Brown have been removed, and upon all of the surplus lands of the petitioner Gritts.

The petitioner, William Brown, is an adult full-blood Cherokee Indian, the father of Charles Brown, deceased, who was his only son, a minor without children or descendants, who died intestate on September 1, 1904, leaving no mother, brothers, or full sisters, and but one half-sister, Josie Elkhair, surviving him—he and the said Josie Elkhair having the same mother. Prior to the death of said Charles Brown he had received an allotment of land in the Cherokee Nation under the act of July 1, 1902.

By section 20 of the said act of July 1, 1902, it was provided that such an allotment should descend to the heirs of the allottee "according to the laws of descent and distribution as provided in chapter 49 of Mansfield's Digest of the Statutes of Arkansas." By said chapter 49 of Mansfield's Digest of the Statutes of Arkansas it is provided as follows:

"When any person shall die, having title to any real estate of inheritance or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

"1. To children or their descendants, in equal parts.

"2. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters or their descendants, in equal parts." (Sec. 2522, p. 575.)

Section 2531, chapter 49, of Mansfield's Digest of the Statutes of Arkansas, edition of 1884, in force in the Indian Territory at the date of the death of the said Charles Brown, provides:

"In cases where the intestate shall die without descendants, if the estate shall come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

The said Charles Brown at the time of his death was a minor of tender years, without children or descendants, and intestate.

XII.

The petitioners, William Brown and Levi B. Gritts, have never been granted authority to represent the Cherokee Nation or any of the enrolled citizens thereof except as provided by the terms of the jurisdictional act aforesaid.

42

XIII.

The said lands allotted to petitioners, William Brown and Levi B. Gritts, and to a large number of those on whose behalf this suit is

brought, and those lands inherited by the petitioner William Brown, as well as lands so inherited by other full-blood citizens of the Cherokee Nation on whose behalf also this suit is brought, are to a large extent suitable for both grazing and agricultural purposes.

XIV.

The full-blood enrolled citizens of the Cherokee Nation, to whom lands in the Cherokee Nation have been and are still being allotted, are in the main in favor of the extension of the period of restriction upon alienation within which they can not alienate, sell, dispose of, or encumber in any manner their lands; and they are also in favor of the supervsion of the Secretary of the Interior over the leasing of their lands and the sale of their inherited lands as provided in the acts complained of in the original petition of the claimants filed in this cause, as they are uneducated and unable to speak the English language and have never before owned alienable lands, and without governmental supervision are incompetent to represent and protect themselves in the sale or leasing of their allotted lands.

XV.

On December 21, 1906, the petitioner, William Brown, filed in the Supreme Court of the District of Columbia a bill attacking the validity of the act of April 26, 1906, and seeking to have the same declared to be in violation of the Constitution of the United States; but, before hearing on the application for a writ of injunction, Congress passed the act of March 1, 1907, conferring jurisdiction upon this court to hear and determine this suit.

XVI.

Prior to the passage of the act of April 26, 1906, *supra*, many of the full-blooded citizens of the Cherokee Nation had been induced by designing persons to execute deeds of their allotted lands, and contracts to sell, and to otherwise encumber their allotments in violation of the provisions of the act of July 1, 1902, *supra*, at grossly inadequate compensation to said Indians for the execution of said deeds, contracts, and mortgages having been made contingent upon the delivery of valid titles to the purchaser or mortgagee as the case might be. Since the passage of the act of April 26, 1906, *supra*, large numbers of such deeds, contracts to sell, and mortgages of their allotted lands, in violation of said last-mentioned act, are being filed almost daily in the offices of the recorders of deeds of the counties of Oklahoma, where the said lands are situated; and suits have been brought by the United States embracing 25,338 transactions in the United States courts of the State of Oklahoma to cancel said deeds, contracts, and mortgages upon the ground that they are a cloud upon the titles of such Indians to their allotments.

43 XVII.

By the act of March 1, 1907 (34 Stat. L., 1025), provision was made for charging the lands of full-blood Cherokee allottees in the

sum of $30,000 to pay for the clerical work connected with the leasing of lands of such allotments for mineral and other purposes, and the sum of $30,000 to pay for the clerical work and labor connected with the sale of inherited lands of the Five Civilized Tribes in the Indian Territory.

The sum of $30,000 appropriated by the act, "for clerical work and labor connected with the leasing of Creek and Cherokee lands, for mineral and other purposes, and the leasing of lands of full-blood Indians," was reimbursed as provided by said act, and the regulations issued by the Secretary of the Interior in pursuance of the provisions of said act were revoked prior to the filing of the amendment to the claimants' original petition, March 26, 1908, complaining of said provision, and the provision for reimbursement for said expenses "for clerical work and labor connected with the leasing of Creek and Cherokee lands," etc., was omitted from the item in the Indian appropriation act approved April 30, 1908 (35 Stat., ——).

Conclusions of Law.

Upon the foregoing findings of fact the court decides, as conclusions of law, that:

(1) The joint resolution of Congress approved March 2, 1906 (34 Stat., 822), and section 28 of the act of Congress approved April 26, 1906 (34 Stat., 137), operated to continue the tribal government of the Cherokee Nation for all purposes under existing laws until otherwise provided by law, and was a recognition by the political department of the Government of the United States of the existence of that tribal government.

(2) The enrolled citizens of the Cherokee Nation, being still members of the tribe and recognized by the political department of the Government of the United States, were not emancipated from the control of Congress by the act of March 3, 1901 (31 Stat., 1447), conferring upon them citizenship of the United States.

(3) The extension of the period of restrictions upon alienation to twenty-five years within which no full-blood Cherokee citizen can alienate, sell, dispose of, or encumber in any manner his allotted lands unless his restrictions shall be removed by Congress, or lease or sell his inherited lands without the approval of the Secretary of the Interior, is a valid exercise of the authority of Congress.

(4) The acts of March 11, 1904 (33 Stat. L., 65), and April 26, 1906 (34 Stat. L., 137), in so far as they or either of them "attempt to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens," beyond those authorized by the act of July 1, 1902, are valid statutes.

(5) The issuance of allotment certificates and allotment deeds, in conformity with the provisions of said act of July 1, 1902, to individual Cherokee allottees, including the petitioners, vested in them the fee-simple title to the lands described in said allotment certificates and allotment deeds respectively.

44 (6) The petitioner William Brown is the sole heir-at-law of Charles Brown, deceased, under the provisions of chapter

49 of Mansfield's Digest of the Statutes of Arkansas, and at the time of the death of the said Charles Brown became the owner of the allotment made to the said Charles Brown.

(7) The petition is dismissed and judgment ordered for the defendants.

Opinion.

PEELLE, *Ch. J.*, delivered the opinion of the court:

By the special act set out in finding X jurisdiction is conferred upon the court, with the right of appeal, "to determine the validity of any acts of Congress passed" since the act July 1, 1902 (32 Stat. L., 716), "in so far as said acts, or any of them, attempt to increase or extend the restrictions upon alienation, encumbrance, or the right to lease the allotments of lands of Cherokee citizens" enrolled as of September 1, 1902, in accordance with said act July 1, 1902.

The importance of the case can hardly be overstated. It involves the power of Congress, after allotments have been made in severalty under the provisions of said act, with certain restrictions against alienation, encumbrance, and leasing, to increase or enlarge such restrictions by subsequent legislation. The decision, the defendants assert, "will affect not only the allotments of 8,689 Cherokee full bloods directly concerned in this case, but indirectly all of the Five Civilized Tribes of Oklahoma, numbering perhaps 30,000 persons."

The character of the title to the lands held by the Cherokees was considered by the court in the recent case of Muskrat and Dick (44 C. Cls., —), holding, on the authorities there cited, that whatever of title was conveyed by the United States by the patent of December 31, 1838, "was conveyed to the Cherokees as a nation," no title being vested in severalty in any of them (Cherokee Trust Fund, 117 U. S., 288; Cherokee Nation v. Hitchcock, 187 U. S., 294, 307). The title so conveyed was subject to the conditions that the tribe should not become extinct or abandon possession of the lands, and as neither of the conditions named had happened when the allotment act of July 1, 1902, was passed, the title remained in the nation for the benefit of all its members, and will continue to be so held until divested by the United States.

The act of July 1, 1902, ratified by the Cherokees by popular vote, imposed for their protection the restrictions set forth, as follows:

"SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

"SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

"SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said commission to make said selection and designation.

"SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

"SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

"SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and for mineral purposes, may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands."

By the act of March 11, 1904 (33 Stat. L., pt. 1, p. 65), the Secretary of the Interior was "authorized and empowered" to grant a right of way for the construction of pipe lines for the conveyance of oil and gas through any lands held by an Indian tribe or nation in

the Indian Territory, and through lands allotted in severalty
46 to individual Indians, "which have not been conveyed to the allottee with full power of alienation," for a period not exceeding twenty years, with the right of renewal for a like period at the expiration thereof, upon such terms as the Secretary of the Interior may determine. As the lands allotted under the act July 1, 1902, have not "been conveyed with full power of alienation," as shown by the sections of the act quoted, the authority of the Secretary of the Interior to grant such rights of way extend and apply to the lands so allotted and conveyed.

While the act — March 11, 1904, does not fall strictly within the letter of the jurisdictional act "to increase or extend the restrictions upon alienation, incumbrance, or the right to lease the allotments of lands of Cherokee citizens," imposed by the act July 1, 1902, it was passed since that date; and if it does not "attempt to increase or extend the restrictions" so imposed, it will necessarily operate against alienation as well as against the freedom of the allottees to incumber or lease such allotments, and, therefore, we will consider it in connection with the subsequent acts to which objection is made.

Thereafter the act of April 26, 1906 (34 Stat. L., 137), sections 19, 20, and 22, provides:

"SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act, unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, That such full-blood Indians of any of said Tribes may lease any lands other than homesteads for more than one year, under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions be, and the same is hereby, declared void: Provided further, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

"SEC. 20. That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee,
47 Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented or leased under order of the proper court: Provided further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

"SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

For the purpose of carrying into effect the provisions of said sections the Secretary of the Interior, in July, 1906, and thereafter, prepared and promulgated necessary regulations whereby the sale and leasing of lands allotted to or inherited by full-blood Indians of the Five Civilized Tribes are to be governed.

By an amended petition filed March 26, 1908, long after the time fixed by the jurisdictional act for the commencement of suit, the claimants attack a provision in said jurisdictional act (March 1, 1907, p. 1025), charging the lands allotted to full-blood Cherokees with clerical expenses connected with the leasing of such allotments for mineral and other purposes; but as that provision clearly is not covered by the language of the jurisdictional act respecting the extension of the restrictions upon alienation, incumbrance, or the right to lease allotments, we will not consider it further than to say that the money so used was reimbursed before the filing of the amended petition herein, and it has since been omitted in the appropriation act of April 30, 1908 (35 Stat. L., —); and besides it can hardly be said that Congress intended the court to consider the validity of the provision in the same act that contained the jurisdictional clause.

The question as to the validity of the act of April 26, 1906, as amended by the act of June 21, 1906—to apply to the Cherokees—so far as said act attempts "to increase the number of persons entitled to share" in the common property beyond those enrolled for

allotment as of September 1, 1902, under the act of July 1, 1902, was considered in the Muskrat case, supra. The decision on the authorities there cited was based on the continued existence, by various acts of Congress, of the tribal government of the Cherokee Nation; and inasmuch as the act under which allotments were made in that case provided for the continued existence of the tribal government until March 4, 1906, the court held that Congress had the power to extend the time for the completion of the roll so as to embrace all Cherokee citizens living on that date.

48 As the common property was held by the nation for the mutual benefit of the communal owners, their rights in the common property continued so long as the tribal government existed. The tribal government having been continued beyond the time fixed in the act of July 1, 1902, for allotment, those born after September 1, 1902, were denied the right to share in the allotments under that act though living on March 4, 1906. But the moment they were born their communal rights attached to the unallotted lands. True, those to whom allotments had been made continued communal owners in the same lands, their rights thereto not having been relinquished under the act of July 1, 1902. But Congress having seen fit to continue the tribal government to March 4, 1906, by the same act which authorized the allotments, the allottees were bound to take notice thereof; and they, having under that act acquired their rights to the exclusion of those born after September 1, 1902, are in no condition to complain if their communal interest in such unallotted lands and undistributed funds be taken to equalize the allotments to all those so born who were living on March 4, 1906. Only by this method could Congress have provided for the equalization of allotments to March 4, 1906, and we held that the power was lodged in Congress to make it.

In the present case the question is somewhat different from that, as it involves the power of Congress, after imposing restrictions against alienation and leasing of allotments to all alike for a fixed time, to extend such restrictions as against the lands allotted to a segregated class designated as "full-blood Indians" of the Cherokee and other civilized tribes.

In the act of July 1, 1902, section 13, the allottee is prohibited from alienating his homestead, taken as part of his allotment, during his lifetime, not exceeding twenty-one years, during which time the allotment is nontaxable and free from debts contracted while so held by the owner.

By section 14 it is provided that the lands allotted to citizens shall not be incumbered or sold to satisfy any debt or obligation, or be alienated by the allottee of his heirs, before the expiration of five years from the date of the ratification of the act. And by section 15 it is provided that all lands allotted to members of the tribe, except the lands selected for homesteads, "shall be alienable in five years after issuance of patent." Section 16 gives the commission authority to select allotments and designate homesteads for those who for any reason fail to do so.

By the act of April 26, 1906, sections 19 and 20, it is provided, in

substance, that no full-blood Indian of the Five Civilized Tribes "shall have power to alienate, sell, dispose of, or incumber in any manner any of the lands allotted to him for a period of twenty-five years" from and after the passage of the act, unless such restrictions be removed by Congress prior to the expiration of such period. And section 19 declares that "for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior."

Right is given by section 20 to full-blood Indians to lease, in writing, with the approval of the Secretary of the Interior, their allotments, other than their homesteads, for one year; and if for
49 a longer period, the lease to be recorded in conformity with the laws of the Indian Territory.

Provision is made in section 22 for the sale by adult heirs and guardians of minors of deceased allottees who have received patents.

However, it is unnecessary here to notice other provisions of the sections of the act further than to say that the provisions look to the protection of the Indians, especially the full-bloods, who are less civilized and therefore less able to protect and care for themselves.

Furthermore, if the act extending restrictions against alienation and incumbrance of allotments by full-blood Indians for the period of twenty-five years be held valid, then the validity of the other minor provisions of the act will follow.

The contention of the claimants is that as Congress by the act of March 3, 1901 (31 Stat. L., 1447), declared Cherokee citizens to be citizens of the United States, they thereby severed the relation of guardian and ward; and having severed that relation it is not within the power of Congress to reestablish it; and having by the act of July 1, 1902, acquired—subject to certain restrictions—vested rights in the lands set apart to them Congress thereby emancipated such allottees and their private property from congressional control.

If that contention be true and the claimants and those they represent are *sui juris*, the invalidity of the acts extending restrictions must be conceded, as the general theory of the law is that every citizen of the United States, not under some disability imposed by law, is invested with authority to manage and dispose of his own property, to enter into contracts, and to do and perform such acts as pertain to his personal rights, obligations, interests, and duties.

Another principle of law equally well established is that every one who is competent and *sui juris* to act for himself may employ another to act for him; and if not competent and *sui juris* to act for himself, the Government, through its proper channel, may act for him to the end that he be protected in his rights of person and property.

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government." (Lone Wolf v. Hitchcock, 187 U. S., 553, 565, quoted in the case of Matter of Heff, 197

U. S., 488, 498.) But this question is too well established to require further comment.

Referring to the acts of Congress continuing the tribal government, and the effect of those acts, the court, in the case of Muskrat et al. v. United States (44 C. Cls., —), said:

"Section 63 of the act of July 1, 1902, provides that 'the tribal government of the Cherokee Nation shall not continue longer than March 4, 1906;' but by joint resolution of Congress, March 2, 1906 (34 Stat. L., 822), the tribal existence and present tribal governments of the Cherokee Nation and other civilized tribes in the Indian Territory were 'continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless hereafter otherwise provided by law.' And thereafter, by section 28 of the act of April 26, 1906, the tribal existence and present tribal government of said nation was, with certain restrictions therein specified, 'continued in full force and effect for all purposes authorized by law until otherwise provided by law.'

50 "Therefore, in considering the questions involved, we shall assume the validity of those provisions continuing the tribal existence and tribal government of the Cherokee Nation in force and effect until all property of said nation shall have been distributed among the individual members thereof."

On the authority of those acts the court must assume the continued existence of the tribal government of the Cherokees. Nor will we analyze the acts to ascertain of how much authority the tribal government has been shorn. We are aware of no authority which makes power in the tribe to act essential to constitute tribal relations, though some power may be presumed.

As the United States is the self-constituted guardian of the Indians, with plenary authority over their tribal relation, it is for Congress and Congress alone to determine when that relation shall cease. In other words, when Congress by their legislation have declared that the tribal government of the Cherokees shall "continue in full force and effect for all purposes authorized by law until otherwise provided by law," the courts can not enter into the quantum of authority remaining in the tribe, and by construction defeat the will and purpose of Congress.

In the case of Matter of Heff, *supra* (p. 499) the court said:

"Of late years a new policy has found expression in the legislation of Congress—a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes, free from national guardianship and charged with all the rights and obligations of citizens of the United States. Of the power of the Government to carry out this policy there can be no doubt. It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the courts to overrule the

judgment of Congress. It is true there may be a presumption that no radical departure is intended, and courts may wisely insist that the purpose of Congress be made clear by its legislation, but when that purpose is made clear the question is at an end."

On the authority of that case the claimants contend that by virtue of the act of March 3, 1901, declaring Cherokee citizens to be citizens of the United States, Congress terminated the relation of guardian and ward, thereby investing them with full power and authority as other citizens of the United States over the control of their property.

In the case of Cherokee Nation v. Hitchcock, *supra* (at p. 309), being an action to enjoin the Secretary of the Interior, under section 13 of the act of June 28, 1898 (30 Stat. L., 495), from leasing oil lands held for the benefit of said nation, the court said: "There is no question involved in this case as to the taking of property; the authority which it proposes to exercise by virtue of the act of 1898 has relation merely to the control and development of tribal property, which still remains subject to the administrative control of the Government, even though the members of the tribe have been invested with the status of citizenship under recent legislation."

51 If citizenship may be conferred upon Indians while in tribal relations without affecting the administrative control of their tribal property, it follows that their communal rights in such property are not thereby removed from the control of Congress.

In the case of National Bank of Commerce v. Anderson (147 Fed. Rep., 87, 90), respecting the sale of allotted lands upon which there was a restriction against alienation for twenty-five years, the court said: "The granting of citizenship does not affect the character of the title to land allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship;" citing, among others, United States v. Rickert (188 U. S., 432) and United States v. Thurston County (143 Fed. Rep., 287).

The purpose of Congress to retain control of the property and lands of the Cherokee Indians is shown by the enabling act of June 16, 1906 (34 Stat. L., 267), admitting Oklahoma into the Union as a State, section 1 of which provides:

"That nothing contained in said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed."

Clause 3 of section 3 provides:

"That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the

United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use."

Under that act Oklahoma was admitted into the Union, November 16, 1907.

It has been held that "the authority of the State can not be so exerted as to impair the power of Congress to regulate commerce with the Indian tribes" (Dick v. United States, 208 U. S., 340, 353). It has also been held that the United States, in conformity with treaty provisions, may for police purposes retain control over lands in a State the Indian title to which has been extinguished and the lands allotted in severalty, notwithstanding the citizenship of the allottees, and that twenty-five years was not an unreasonable period. (Dick v. United States, *supra.*)

Though the enabling act was passed June 16, 1906, Oklahoma was not admitted into the Union as a State until after the acts of 1904 and 1906 were in force. Besides, the right of the Government respecting the person and property of the Indians was reserved in the enabling act "to make any law or regulation respecting such
52 Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed." Hence, no question of conflict between national and state authorities is involved.

Does this authority of the United States extend to lands allotted in severalty to Indians declared to be citizens of the United States while tribal relations continue?

The full-blood Indians to whom allotments have been made are in the main in favor of the restrictions placed upon their lands by the acts in question, and are in favor of the supervision of the Secretary of the Interior over the leasing and sale of their lands, as set forth in Finding XIV. And this, doubtless, for the reason, as set forth in Finding XVI, that prior to the passage of the act of April 26, 1906, many of the full-blood Indians had been induced by designing persons to sell and convey their lands, or contract to sell or to otherwise incumber the same, at grossly inadequate compensation and in violation of the act of July 1, 1902.

The same finding also recites that since the passage of the act of April 26, 1906, large numbers of such deeds, mortgages, and contracts to sell and incumber their respective allotments are being filed daily in the office of the recorder of deeds in the counties where such lands are situate, all in violation of said act of 1906. In other words, these were the conditions respecting the lands allotted to the full-blood Indians when the act of 1906 was passed for their protection.

But, independent of the findings, the court will take judicial notice of the Indians as wards of the nation and their consequent dependence upon the Government as their guardian. The native Cherokees were even opposed to the allotment act of 1902, preferring to continue their tribal relations and the communal ownership of the

lands. This is shown in the Cherokee Intermarried Whites Case (203 U. S., 76, 93), where the court, after designating said allotment act as an act of Congress and not a treaty, said: "It is a singular commentary on the situation that the majority of the native Cherokees voted against its acceptance, which was carried by the vote of the whites."

The full-bloods or native Cherokees are uneducated and unable to speak the English language, and without the protection of the Government it is manifest that they are liable to lose the lands allotted to them. The restrictions placed upon their lands against alienation, incumbrance, and leasing will be removed when the Government is satisfied that it can withdraw its protection without detriment to the interests of the owners. This is evidenced by the act of May 27, 1908 (35 Stat. L., ——), whereby the acts of 1902 and 1906 have been materially changed and modified, as therein shown.

By section 19 of the act of 1906 the lands upon which the restrictions were imposed are free from taxation so long as held by the original allottees, and this is a benefit and protection and not a detriment to the owner.

As was said by the court in the case of Lone Wolf v. Hitchcock (187 U. S., 553, 567), quoting from the case of United States v. Kagama (118 U. S., 375, 383), "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, be-
53 cause the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce it- laws on all the tribes." So here the exercise of the power of government is necessary to the protection of the less civilized, the weak and the unlettered full-blood Indians, against designing men, as well as for the safety of those with whom they dwell. This does not involve a taking of the property of the full bloods, as the acts in controversy simply subject their allotments to administrative control for their sole benefit until they are *sui juris* and competent to protect themselves.

It would be strange indeed if the Government in dealing with its wards, desiring to aid them in taking an advance step in civilization by conferring upon them citizenship and the right to hold real estate in severalty, could not invoke its own power while tribal relation exists to protect them in the rights thus conferred. We think the power to do so rests in Congress, notwithstanding the citizenship conferred upon the Indians and the allotment of their lands in severalty.

The acts in question seek the protection of those most in need thereof, and they wisely consent to the administrative shield. If they consent, though by the jurisdictional act some of their number are designated to maintain this action, who will be harmed or what principle of law will be violated in holding the acts valid while tribal relations are recognized by Congress?

In respect to the act of March 11, 1904, *supra*, giving the Secre-

tary of the Interior authority to grant, for a period of twenty years, with the right of renewal, rights of way for the construction of pipe lines through lands allotted in severalty to individual Indians "which have not been conveyed to the allottee with full power of alienation," we must hold, so far as we are authorized to consider this act, that in view of the recognized and continued existence of the tribal government the authority therefor, as an administrative act, rests with Congress. Whether, if tribal relations should cease, the act would operate to limit the power of the Secretary within the period of disability imposed by the allotment act of July 1, 1902, or whether the authority of the Secretary to grant such rights of way through lands of individual allottees when such allottees shall have acquired full power of alienation, we deem it unnecessary now to decide. So far as the authority of the Secretary to grant such rights of way through tribal lands, we think there can be no question in view of the authority of Congress to control tribal property.

These acts of 1904 and 1906, and any other acts looking to the protection of the title of these full-blood Indians to the lands allotted to them, are analogous to the protection afforded by the States to the property of infants and others incompetent from any cause to manage their own affairs, though they be citizens of the United States.

It is a just and wise exercise of power, and rises above technicalities. The protection of property against alienation and incumbrance by those incompetent to appreciate the responsibilities of ownership, and, therefore, unable to resist designing men, is essential to the welfare of society, and, therefore, not subversive of the Constitution, but is in furtherance of its purpose to establish justice, insure domestic tranqul-ity, and to promote the general welfare.

Therefore we may concede that if the claimants were separated from their tribe and were *sui juris* and competent to manage their own affairs the acts extending the restriction upon the lands of the full-blood Indians might well be held a discrimination among the members of the tribe and an interference with the property rights of citizens of the United States, and, therefore, obnoxious to the Constitution in the sense that the right of alienation, incumbrance, and leasing of their lands was interrupted and delayed; nevertheless, as the restrictions were imposed for their manifest benefit, *i. e.*, that they might have the continued possession, ownership, and consequent enjoyment of their lands until such time as the Government was satisfied they were competent to repel designing men and manage their own affairs, we must hold the several acts valid and effective to accomplish the purpose for which they were enacted.

54

The petition is dismissed.

HOWRY, Judge, delivered the following dissenting opinion:

The grave constitutional questions presented relate to the right of Congress to increase and extend the restrictions originally placed upon the alienation, encumbrance, and the right to lease certain lands of Cherokee citizens of the United States beyond the terms of an act approved July 1, 1902, 32 Stat., 716, under which allotments were

made to individual Cherokees and for which separate certificates were issued for nontaxable homesteads made inalienable during the lifetime of the allottee not exceeding twenty-one years, but not liable in debt contracted by the owner while so held by him; and as to other lands allotted such lands were made inalienable for five years after issuance of the patents. The act of allotment provided that if any person whose name appeared upon the roll should die subsequent to September 1, 1902, and before receiving his allotment, the lands to which such person would have been entitled if living should be allotted in his name and (with his proportionate share of other tribal property) descend to his heirs according to the laws of Arkansas. These provisions were submitted by the terms of the allotment act to the Cherokee people, who by popular vote ratified and agreed to the same. The United States closed the transaction by the issuance of patents, and the several parties took possession of their property under certificates which vested the absolute title in the petitioners and those who with them became the owners in severalty of the land.

Furthermore, the act under which the conveyances were made provided that such conveyances when approved by the Secretary of the Interior should serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in the patent. It appears that the conveyances were approved according to law (sec. 59). By the acceptance of the patent every individual allottee was "deemed to assent to the allotment and conveyance of all the lands of the tribe as provided in the allotment act and to relinquish all his right, title, and interest to the same, except in the proceeds of lands preserved from allotment." (Sec. 60.)

At the time of the passage of the allotment act every Cherokee had been made a citizen entitled to all such rights, privileges, and immunities as other citizens of the United States.

By an act approved March 11, 1904, 33 Stat., 65, the Secretary of the Interior was authorized to grant rights of way for the operation and maintenance of pipe lines for oil and gas through
55 the allotted lands of the petitioners for twenty years, and at the end of that period to extend the right to maintain such pipe lines for another period of twenty years. By another act, approved April 26, 1906, 34 Stat., 137, Congress attempted to impose further restrictions by forbidding any full-blood Cherokee to alienate, sell, or encumber any of the lands allotted to him for a period of twenty-five years from that date. Full bloods were given the privilege of leasing lands other than homesteads for more than one year, but only under government rules and regulations. Leases and rental contracts (except for agricultural purposes) of lands other than homesteads were to be ineffective without the approval of the Secretary of the Interior; and adult heirs of any deceased Cherokee whose selection has been made could convey lands inherited only when approved by the Secretary.

There is really nothing new to be said outside of the adjudicated cases and their proper relation to and bearing upon the issues. But with fixed ideas as to the meaning of a grant, and because no case (out of at least 100 discussed) has been cited which sustains the

proposition that land once granted can be seized and controlled by the Government except in the exercise of the right of eminent domain, I am unable to accept the Government's contention that the acts of Congress which attempt to do so are valid.

It is not meant to say that the act conferring citizenship upon the complainants either altered or affected the conditions which accompanied the original grant. But when the land was granted the character of the title allotted to the complainants and other full bloods was the same as if allotted to other citizens. The title of the one became as unqualified as the title of the other, and any attempt to differentiate between the fee so held can only be sustained upon the theory that the Indian can never acquire such a right to land as the Government is bound to respect.

Nor am I alone in this view, inasmuch as some of the ablest members of the United States Senate officially declared to Congress that the legislation known as the McCumber amendment was not valid; and a report to that effect was promptly acted upon by the same Congress that enacted a part of the legislation (which forms the subject-matter of the complaint here) by the passage of the act of our jurisdiction.

Preliminary to any discussion of the merits, the majority of the court seem to have made objectionable findings, as I view them; and though probably not intended to prejudice petitioners, some of them are calculated to mislead.

None of them are necessary, because the courts must take judicial notice of the only essential fact necessary to be considered—that allotments to land and other valuable rights were conferred by a law specifically enacted to carry out the treaties of the United States with the Cherokees, which those people accepted by complying with the conditions fixed for title to vest and *which the United States ratified by putting the parties in possession* under the patents of the Government. The attempt to set aside settled titles thus acquired is in violation of what the Supreme Court declared in Choctaw Nation, 119 U. S., 29, and again in U. S. v. Old Settlers, 148 U. S., 473, that "Where, in professed pursuance of treaties, statutes have conferred valuable benefits upon Indians, which the latter have ac-
56 cepted, they partake of the nature of agreements—the acceptance of the benefit, coupled with the condition, implying an assent on the part of the recipient to the condition."

The fourteenth finding of the court alleges that the full bloods "in the main" are in favor of the extension of the period of restriction upon alienation or incumbrance of the lands and the supervision of governmental authority over leasing as well as supervision of the sale of the inherited lands. Apparently, then, this litigation is a continuation of the local controversy existing between the headmen of the Cherokees and other allottees who, having possessed themselves of their property, naturally want to make use of it.

But these differences were concluded by the allotment act when ratified, and the Supreme Court recognized the force of the popular approval given to the act of July 1, 1902 (which made the allotments), by saying through Mr. Chief Justice Fuller in the Cherokee

Intermarriage Cases, 203 U. S., 93, that the majority of the natives voted against the acceptance. Nevertheless, the court affirmed the cases and closed the controversy with the statement that the allotments then being apportioned were according to the terms of the act which provided for them.

This disposes of the mere matter of what some of the full-bloods want, as the allotment scheme has accomplished by law that which the wishes of some of the individuals to the agreement can not now influence. The partisan statements of the few individuals who have undertaken to testify should no more influence the action of the court on the constitutional question than the report of the Senate committee on the same subject (predicated upon two volumes of printed testimony) to the effect that the later legislation was unwise and injurious to the Cherokees.

"While it is ordinarily true," said the Supreme Court, "that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, or other similar matters of judicial cognizance." 170 U. S., 32. As the judicial power is strictly limited to the determination of the power of Congress to interfere no testimony should or can be considered.

The lands in controversy, like the neutral lands in Holden v. Joy, 17 Wall., 211, were lands conveyed immediately and directly from the United States to the Cherokee Nation under the treaty of 1835, 7 Stat., 479. Assurances were given to the Cherokee Nation that such lands would be conveyed to them "in fee simple." When the Cherokee constitution was adopted the title to the common property passed from the communal owners and became vested in the nation. Whitmire's Case, 30 C. Cls., 154; Eastern Cherokees v. United States, 40 Ibid., 252; 202 U. S., 101. All these lands were conveyed by patent in execution of the stipulations contained in several treaties—those of May 6, 1828, February 14, 1833, and December 29, 1835—which granted the lands unto the Cherokee Nation "to have and to hold the same, together with all the rights, privileges, and appurtenances belonging unto the said Cherokee Nation forever." By article 4, of the treaty of 1846, it was agreed on the part of the United States that all these lands "shall be and remain the common property of the whole Cherokee people;" and the Cherokee
57 constitution (1839) provided that "the lands of the Cherokee Nation shall remain common property." Another treaty in 1866 resulted. Article 1 amending that treaty repeated the declarations of previous treaties that the lands of the Cherokee Nation should remain common property, but also carried a provision that such lands should remain common property "until the national council shall request a survey and allotment of the same in accordance with the provisions of article 20 of the treaty of July 19, 1866." In Red Bird et al., Citizens of the Cherokee Nation by Blood, v. United States, 203 U. S., 81, the Supreme Court recognized the completeness of the agreement in redemption of treaty promises and with the issuance of the patents the scheme was carried out according to that decision.

Especially does it seem unnecessary to attempt to arraign the motives and conduct of a whole people, whose efforts to develop a new country have led to criticism of purchasers and lessees as designing men. If it be true that many of the full-bloods were induced to make contracts to sell or encumber their allotments, in violation of the terms of the act of July 1, 1902, contingent upon the delivery of valid titles, those transactions do not concern this controversy, and the courts of Oklahoma are open to the grantors to set aside such contracts.

Many of the suits relate to the purchase of fractions of land reserved for town sites. Finding sixteen relates in part to these, and to transactions involving personal transfers under the act of 1902 for considerations not the subject of complaint and proper considerations which the grantors as well as the grantees supposed they had a right to give and receive. This right to buy and sell despite the act of 1906—which is the subject of the complaint—is the thing in issue; not that the Indian is yet a child unable to help himself, needing forty more years of segregation from his white brother, to be left standing in the path of progress, and unfit to be absorbed into the habits and industrial life of the people among whom his lot is cast as a citizen.

Passing to the consideration of the real issue which according to the requirements of the jurisdictional act the court must consider, the Government contention is: (1) That the acts of the Government authorized to be exercised by the subsequent legislation of April 26, 1906, do not amount to a taking of the property. The court adopts this contention, but it seems to me to beg the question.

Any interference which destroys the market value of an owner's individual property is the equivalent of a taking.

The inheritances provided for in the allotment act of July 1, 1902, had taken effect and fixed rights not only for those authorized to inherit, but also accomplished results for those intervening as purchasers or lessees within the limitations of the act which gave the allotments. The efforts of the Government now to control the land beyond the terms first fixed constitute the imposition of such penalties upon the present allottees in the use of their property as practically to convert the fee derived by them under the terms of the grant into a life estate—with limitations upon the use so serious in character as to even lessen the value of the life estate itself. These efforts attempt to surrender to the lawmaking power the right of continued interference not only as such interposition may affect the living generation but future generations of Indians as well in the control and enjoyment of private property held by as good a title as can be conferred by law.

58 "Some things lie too deep in the common sense and common honesty of mankind to require argument or authority to support them." So said the Supreme Court. Fixed rules which obtain everywhere for the protection of private property are in this class and apply to Indians in possession under a lawful grant as much as to others holding by a patent from the Government, regardless of citizenship.

The right claimed for the Government to grant rights of way for the operation and maintenance of pipe lines, oil and gas, through the allotted lands for twenty years and at the end of that period to extend the right to maintain such pipe lines for another period of twenty years would seem to any holder of land to be a taking of his property. The right to lease lands held in fee simple without governmental supervision and to grant rights of way for pipe lines to public-service corporations and others and directly receive the revenues arising therefrom is as much the individual right of the Indian as the right of any other citizen of the United States. If Congress can constitutionally provide for the interference indicated by its later legislation, they may equally provide other and different methods for the disposition of the interests involved and especially of those parties holding lands by inheritance. The compensation to be paid the allottees whose lands are attempted to be made subject to the easement indicated and provided to be fixed and collected by the Secretary of the Interior is a direct taking, even though the legislation is assumed to be for the benefit of those possessed of the allotments.

The grant of rights of way over the allotted lands is a violation of constitutional provisions.

Whether the pipe-line companies to which the Secretary of the Interior is attempting to grant rights of way under the later legislation are public corporations need not be considered. But independent of the character of these corporations to whom rights of way are proposed to be granted, it does not seem proper for any government officer to fix the compensation. Inasmuch as the Secretary of the Interior is given that right by the legislation which forms the subject-matter of the complaint it will be noted that the privilege of a trial by jury is denied, thereby burdening the owner of the estate with an improper easement and consequently infringing the prohibition against the taking of private property without due process of law. The exercise of governmental authority under the circumstances also means the taking for public use of property without adequate compensation. In its last analysis the exercise of such governmental authority means that private property is authorized to be taken for private use.

Again, section 19 of the act of April 26, 1906, makes all lands upon which restrictions are removed subject to taxation. This is in violation of the special privilege conferred by section 13 of the allotment act of July 1, 1902, exempting homestead allotments from taxation so long as such homesteads should be held by the allottees. This exemption from taxation was and is a valuable property right which legislation cannot destroy; and the attempt to destroy this right is a taking of property in the constitutional sense. For the reasons stated and because property once lawfully acquired by anyone cannot be so interfered with as to destroy or lessen any of the
59 rights of that property in the hands of the owner, there was such a taking as the Constitution forbids.

It is next contended by the Government (2) that the legislation subsequent to the act of July 1, 1902, operated to continue the tribal

government of the Cherokee Nation and the control by Congress of the property of the individual Cherokee, despite the allotment act which surrendered control of such land as was conveyed in fee simple to the individual members of the tribe. But the conclusion of the court—that the issuance of allotment certificates and conveyances to petitioners and other individual Cherokees vested in them the fee-simple title to the lands respectively—though correct, is inconsistent with the theory that the Government may destroy its patents because the owners are Indians.

The rights involved in the defense of the exclusive use and control of land by persons properly in possession as owners under the Government's patents are not such rights as come within the category of "technicalities," but are vested rights. "The enjoyment, present or prospective, by some particular person or persons in property as of present interest." Pearsall v. R. R. Co., 161 U. S., 646; Cooley's Constitutional Lim., 332.

It was the early English law that a vested right was "an immediate right of present or future enjoyment." Fearne's Contingent Rem. The right of property consists in the free use, enjoyment, and disposal of all the acquisition without any control of diminution save only by the laws of the land. 1 Blacks., 138.

Where land is granted, the legislative power is incompetent to annul the grant and give the land to another. Such a law is void. Fletcher v. Peck, 6 Cr., 87. A government is never presumed to grant the same land twice. 7 J. R., 8. A grant by act of Parliament which conveys a title good against the King takes away no right of property from any other; though it contains no saving clause, it passes no other right than that of the public although the grant is general of the land. 1 C. O., 274, *b;* 1 Bent., 176; 5 J. R., 263. In Arredondo's case, 6 Pet., 609, the principle is reaffirmed that where land is once granted, the legislative power is incompetent to annul the grant. A State cannot impose a tax on land granted with an exemption from taxation, New Jersey v. Wilson, 7 Cr., 164; nor take away a corporate franchise. Dartmouth College v. Woodward, 4 Wheat., 518. Where a second patent has issued to land such second patent would be void because of the previous grant. See Easton v. Salisbury, 21 How., 428. Where a certificate shows reservation under a treaty *and the action of the Indian in settling upon it* the production of a certificate to that effect from the proper officer makes the land reserved and any subsequent patent becomes void. Polk's Lessee v. Wendell, 9 Cr., 87; Bagnell v. Broderick, 13 Pet., 436. Allotment certificates, like certification of lists of land under special acts, convey a title as complete as patents. Barney v. Dolph, 97 U. S., 652; Frasher v. O'Connor, 115 U. S., 102; Noble v. Union River, 147 U. S., 165.

The inheritances provided for by this allotment act had taken effect, and, becoming effective, accomplished precisely that which any settlement could effect under any other kind of lawful agreement. Accordingly the right conferred by means of the inheritance of the

lands actually allotted became as much a vested right in the
60 person of the heir as the patent of the Government carried the vested right to the original allottee unless the Government could confer the fee and take it away because the beneficiaries were Indians.

But, said Chief Justice Marshall, this is a government of laws and not of men; and when the title vested in the Indian, either by direct allotment or by succession, the recipients were supposed to be as much within the protection of the law as others. The title could not vest and yet be subject to the control of the grantor. If it could, there was no investiture. This court is in entire harmony, however, that the title did vest. When it did there was nothing left for new legislation to operate upon as to the lands which had passed out of the control of the Government. As well might it be said if money had been distributed and annuities had been paid that subsequent legislation might provide for recovery as to say that a supplemental enactment could operate upon the title of land given absolutely to the individual.

Words of present grant excepted, the Supreme Court has been uniform in the holding that every patent passed a perfect and consummate title. Wilcox v. Jackson, 13 Pet., 498.

The whole question comes back to the proposition whether the United States, never having had a title of their own and having lost administrative control by carrying out its several treaty obligations, can now reestablish the relation of guardian and ward formerly existing between the Government and those receiving the allotments after the relation had been severed as to the property conveyed.

If "unlettered people" understood that their treaties meant what all others knew they meant the relation of guardian and ward ceased when the treaties were executed; and under the rule declared in Worcester v. Georgia, 6 Pet., 582, the treaties accomplished under the law with the consent of the tribe as well as the Government what both parties intended.

The theory of the majority is, citing Lone Wolf v. Hitchcock, 187 U. S., 553, and the Matter of Heff, 197 U. S., 488, that plenary authority over the subject-matter continues political, not subject to be controlled by judicial determination. The difficulty with the application of this proposition is the difference between the titles and the relations of the parties with respect to the tenures of the lands. The allottees here are neither communal owners nor is the property any longer common. Congress can by no act reassume control upon the theory that the property is of a community character, or that the tribe has any ownership in common of the allotted property. In Lone Wolf v. Hitchcock, *ante*, the Supreme Court planted further political authority squarely upon the proposition that the Indians there had not been emancipated from the control and protection of the Government in so far as that control and protection *related to the tribal lands of the parties concerned*, citing Choctaw Nation v. United States, 119 U. S., 1, and Stephens v. Cherokee Nation, 174 Ibid., 445. Mr. Justice White expressly put the decision upon Cherokee Nation v. Hitchcock, 187 U. S., 294, "where it was held

that full administrative power was possessed by Congress *over Indian tribal property.*" The court presumed for all four cases that Congress acted in good faith because the property *remained communal and common,* which meant unallotted lands. No such presumption can be applied in the case at bar because no refinement of language can make any property, where the title has been received as
61 a matter of individual right, a tribal interest in that property. It became individual and ceased to be tribal for any purpose.

Possibly treaties may properly be broken and new laws unsettling fixed rights may be desirable for the full bloods indefinitely, if each and all of them *individually* indicated consent.

But no request of the Cherokee government could be the basis of further legislative control, because the tribal government had only been retained for the purpose of distributing lands not allotted in severalty to those designated to receive the same. The proposition that governments of any kind can interfere here means for people supposed to be more civilized than any other class of Indians a kind of guardianship more arbitrary than anything ever yet declared.

The Supreme Court has never acquiesced in any such proposition. In New York Indians v. United States, 170 U. S., 23, the court rejected a proviso by saying: "There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of arrangement with * * * an Indian tribe" by the assertion of a material provision unknown to one of the contracting parties and kept in the background to be used by the other only when exigencies demanded.

In Jones v. Meehan, 175 U. S., 1, an allotment had been made not to a citizen of the United States but to an Indian. It was held that the title to the property could not be interfered with by any subsequent act of Congress or by the executive departments. The series of decisions reviewed by the court discloses that as the reserve sections became individual property the reservation became the "equivalent to a present grant of a complete title in fee simple;" alienable by the grantee at pleasure *unless by treaty or contemporaneous act* Congress restricted alienation.

In Garfield v. United States, ex rel. Goldsby, 211 U. S., 249, the court said that "it has always been recognized that one who has acquired rights by an administrative or judicial proceeding can not be deprived of them without notice and an opportunity to be heard"—thus defining the meaning and extent of constitutional practice against action without due process of law.

In Wallace v. Adams, 204 U. S., 415, the principle was affirmed that an allotment certificate when issued like a patent to land was dual in its effect because it was an adjudication of the special tribunal empowered to decide that the party to whom it was issued became entitled to the land and was a conveyance of the right.

In Wiggan v. Connolly, 163 U. S., 56, the court dealt with a contingent estate; the property was plainly tribal and not held in fee simple by the individual.

Preceding the act conferring citizenship upon the Cherokees, 31 Stat., 1447, doubts were stated by a committee report to Congress as

to whether the parties could perform any of the usual personal business engagements daily taking place on a vast scale where they lived without a technical violation of the laws requiring supervision of the Cherokees. A reason thus appeared for making these people citizens. It was one of the steps taken to discharge the recipients from the supervision of the agencies of the General Government. In the Matter of Heff, 197 U. S., 508, the Supreme Court held that Indians receiving the privileges of citizenship were outside of all
62 police regulations on the part of the Congress without the consent of the *individual* Indian and the State. The court said that the logic of the argument to the contrary implied that the United States could never release itself from the obligation of guardianship; that the reach to which the argument went for the assumption of the rights of guardianship which it has once abandoned demonstrated its unsoundness.

For the reason that political rights (protected so carefully for the Indian-made citizen in Heff's case) are of no greater importance and rise no higher than the property rights of the Indian citizen where, when the grant of the property right took effect, the Government abandoned its guardianship over the Indian—certainly to the extent of the land granted and put in his possession by the Government—the legislation which forms the subject-matter of this complaint does not seem to me to be a valid exercise of the legislative power. If it be valid legislation there is no limit to the exercise of political authority over an Indian grant no matter how ancient or how long held by the Indian beneficiary. And certainly there is a time when political control ceases to be plenary and lawful and can become arbitrary and unconstitutional.

63 VIII. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the eighth day of February 1909, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of William Brown and Levi B. Gritts on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, be, and the same is hereby dismissed.

BY THE COURT.

64 IX. *Order of Court on Claimants' Motion for New Trial and Defendants' Motion for Amended Findings.*

On March 1, 1909 the claimants filed their motion for a rehearing and on March 27, 1909 the defendants filed their motion for amended findings of fact.

On March 29, March 31, and April 1, 1909 these motions were argued and submitted.

On June 10, 1909 the following order was filed by the Court:

Order.

The claimants' motion for a new trial is overruled.

Claimants' motion and defendants' motion to amend the findings are allowed in part and overruled in part, as shown by findings this day filed as of February 8, 1909. The judgment and opinion as rendered to stand.

Howry, J., will file a dissenting opinion before the allowance of any motion for an appeal.

BY THE COURT.

Filed June 10, 1909.

65 X. *Application for and Allowance of Appeal.*

In this cause come the petitioners by attorney and pray an appeal to the Supreme Court of the United States from the judgment of this court entered on the 8th day of February, 1909.

WM. H. ROBESON,
DAN'L B. HENDERSON,
JOHN J. HEMPHILL,
Attorneys for Petitioners.

Filed August 27, 1909.

Ordered: That the above appeal be allowed as prayed for.

STANTON J. PEELLE.
Chief Justice.

August 28, 1909.

66 In the Court of Claims.

No. 29987.

WILLIAM BROWN and LEVI B. GRITTS, on Their Own Behalf and on Behalf of All Other Cherokee Citizens Having Like Interest in the Property Allotted under the Act of July 1, 1902,

v.

THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusions of law filed by the Court; of the opinion of the Court and of the dissenting opinion by Howry, J.; of the final judgment of the Court; of the order of the Court on the motion of the claimants for re-hearing and of the defendants for amended findings of fact; of the application of the claimants for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 20th day of September, 1909.

[Seal Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 21,830. Court of Claims. Term No. 331. William Brown and Levi B. Gritts, on their own behalf and on behalf of all other Cherokee citizens having like interest in the property allotted under the act of July 1, 1902, appellants, vs. The United States. Filed September 20th, 1909. File No. 21,830.